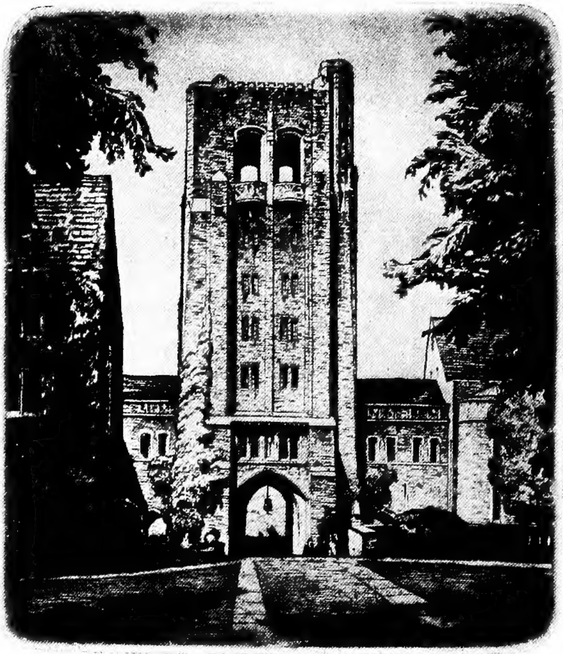

THE LAW OF INSURANCE

A TREATISE

ON THE

LAW OF INSURANCE

INCLUDING

FIRE, LIFE, ACCIDENT, CASUALTY, TITLE, CREDIT
AND GUARANTY INSURANCE
IN EVERY FORM

BY

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ELLIOTT ON INSURANCE.

PART I.

OF THE CONTRACT OF INSURANCE, AND THE PRINCIPLES BY WHICH IT IS GOVERNED.

CHAPTER I.

INTRODUCTORY.

§ 1. **Sources of the law of insurance.**—The law of insurance has been developed from the customs of merchants and the maritime law of the Middle Ages. For many years marine insurance only was known, and it is only within recent years that the contract has been applied to risks other than those of the sea. As late as 1796 a learned English writer said that "when insurance is mentioned by professional men they mean marine insurance." But by the beginning of the nineteenth century the general principles upon which the contract rests were reasonably well settled, and the later developments have been little more than their application to new conditions.

It is not the intention in the limited space at command to treat of marine insurance in detail, but it must necessarily often be referred to, as historically it furnishes the broad foundation upon which the law of insurance rests.[1] As we trace its history toward its uncertain

[1] For the history of the practice and law of insurance, see Marshall Ins. (5th ed., 1805), Introd.; Duer Marine Ins. (1845), Introd. Disc.;

origin it gradually widens from judicial decision until it rests upon the broadest principles of general jurisprudence. Many distinguished writers assert that the law of insurance is a part of the law of nations, but this is true in but a very limited sense. Thus, with reference to marine insurance and maritime law, Blackstone says[2] that "there is no other rule of decision but this unwritten law collected from the history and usage of such writers of all nations as are generally approved and allowed of." Emerigon says[3] that it belongs rather to the usages of merchants than to the civil or municipal law, and "though it did not until very late become the special object of legislation, it is not the less regulated by the general principles of justice and equity that abide in the written reason of the law."

In studying the law of insurance we may therefore properly follow the example of Mansfield, Story and Kent, and resort to those ancient wells of learning from which have been drawn the principles which, although established for the protection of the adventurous merchants of the Middle Ages, are every day applied by modern courts in the decision of current cases.

These laws and customs are found in various collections. The most ancient is the famous *Consolato del Mare,* which was in force at least as early as the eleventh century, and for many years thereafter was received as law by all the states of Southern Europe. It contains no reference to insurance as we know it, but does show that a kind of mutual insurance was then in use.[4] Next in order of time come the Laws of Oleron, which were in force by the middle of the thirteenth century. Oleron was an island on the coast of France, within the jurisdiction of the ancient province of Guienne. There has been much controversy as to the origin and value of these laws. They contain no reference to insurance, but this does not prove that it was not in use among the French merchants, as they are merely rules for the government of mariners at sea and the determination of the relations between sailors, ship-owners and merchants.

Near the close of the thirteenth century we find a collection of laws

Joyce Ins. (1879), Prelim. Chap.; Kent's Com. (13th ed.) 342, 487; Emerigon Traité des Assurance (Boulay-Paty's ed., 1827), Preface and ch. 1; Alauzet Traité General des Assurances, early chapters of Vol. I; Richards Ins., ch. 1; Fire and Life Insurance, ch. 1; 9 American Cyclopedia 314.

[2] 4 Bl. Com. (Hammond's ed.), ch. 5, p. 89.

[3] Emerigon Ins. (Meredith's Trans.), 4.

[4] Alauzet Traité General des Assurances, Tom. Prem., p. 42.

made by the merchants and masters of the "Magnificent City of Wisbuy." They greatly resemble the Laws of Oleron, and for many years were accepted by the states of Northern Europe. They also are laws governing navigation and not commerce, and hence we do not expect to find in them any distinct allusion to the practice of insurance.[5]

The laws of the Hanse towns, published about 1593, are very similar to those of Oleron and Wisbuy. They mention bottomry, but not insurance. Duer says[6] that, "The merchants of the Hanseatic league, when these laws were compiled, had been for nearly three centuries the carriers of Northern Europe, and during the whole of that period had been accustomed to meet the merchants of Italy, Spain, France and England at the staple towns they had established in Flanders, Antwerp and Bruges. That in 1597, and even in 1614 (for in that year their original laws were revised and enlarged, still omitting the subject of insurance), they alone were ignorant of the practice that had prevailed for centuries among the merchants of the rest of Europe, it would be irrational to believe; nor is it difficult to assign the reason for their omitting at this time to make any special regulations relative to insurance. An ample ordinance on that subject was published at Antwerp, under the authority of Philip II, in the year 1563, and the conjecture is more than probable that the rules of this ordinance were adopted and deemed sufficient by all the merchants of the north of Europe. Of the existence and provisions of such an ordinance, in a city which was then a place of common and chief resort, they could not have been ignorant."

The celebrated Ordinance of Marine of Louis XIV was published under the auspices of Colbert in 1691, and was the first complete code of maritime and commercial law; and "when we consider the originality and extent of the design and the ability with which it is executed, we shall not hesitate to admit that it deserves to be ranked among the noblest works that legislative genius and learning have ever accomplished." The part which relates to insurance is the basis of the present French law upon the subject and is embodied in Napoleon's justly famous code.

The Ordinances of Barcelona are the most ancient of those which

[5] Marshall Ins. (5th Am. ed., 1805), Pre. Disc.; Emerigon Ins., Pref. xiii; Duer Mar. Ins. 41, note.

[6] Duer Mar. Ins., Introd. Disc., 47.

treat expressly of insurance. A translation of all the foreign ordinances on this subject was published by Magens.

Space will allow for little more than the names of the famous commentators who have by their genius thrown light upon this field of the law. The most ancient treatise is *Le Guidon de la Mer,* which is found in a collection published at Rouen by Cleriac in 1671, but without any account of its origin. It was doubtless written near the close of the preceding century. It is well arranged, and many of the rules have entered into the general law of the subject. The essay of Roccus, translated by an American lawyer and published in this country, is still frequently cited. Of the famous treatises of Pothier, Valin and Emerigon, I can do no better than follow the example of Duer, and quote the language of Chancellor Kent. "Valin's copious commentary upon that part of the Ordinance of Louis XIV, which relates to insurance, is deserving of great attention, and it has uniformly, and everywhere, received the tribute of the highest respect for the good sense, sound learning and weight of character which are attached to his luminous reflections. Pothier's essay on insurance is a concise, conspicuous, accurate and admirable elementary digest of the principles of insurance, and it contains the fundamental doctrines and universal law of the contract. But the treatise of Emerigon very far surpasses all preceding works in the interest, value and practical application of its principles. It is the most elaborate, learned and finished production on the subject. He professedly carried his researches into the antiquities of the maritime law, and illustrated the ordinances by what he terms the jurisprudence of the tribunals; and he discussed all incidental questions, so as to bring within the compass of his work a great portion of international and commercial law connected with the doctrines of insurance. In the language of Lord Tenterden, no subject in Emerigon is discussed without being exhausted; and the eulogy is as just as it is splendid."

§ 2. **Insurance in Roman law.**—It is uncertain whether the contract of insurance was known to the Romans, but the weight of argument leads us to believe that it was in common use. The leading writers who assert the contrary, such as Parke and Marshall, are largely influenced by the fact that the Roman law, as it has come down to us, has few, if any, references to such a contract. The contracts of bottomry and respondentia—the loan of money on a vessel or a cargo, to be paid only in the event of its safe arrival—were

well known and in extensive use. The titles which cover these subjects are among the most ample and instructive, but neither the Institutes, Pandects, Code or Novels, nor the laws of the Emperors after Justinian, contain any trace of the existence of insurance as a distinct and independent contract.

Notwithstanding this, the probabilities are greatly in favor of its existence. Certain references are found which seem to point to the practice of insurance. Emerigon cites two instances in Roman history.[7] We are told by Livy[8] that during the republic the government, for the purpose of encouraging merchants who had contracted to supply the army abroad with provisions, agreed to bear all losses that might happen to the cargoes during the voyage from perils of the sea, or hostile capture. So Suetonius[9] says that during a period of apprehended scarcity at Rome the Emperor Claudius offered a similar immunity to those who would bring provisions to the city. This was neither more nor less than an insurance by the government, and the consideration or premium therefor was the public benefit accruing therefrom.[10] It is true that it does not prove the existence of insurance as a private contract, but it shows that merchants were familiar with the idea of such protection, and increases the probability that it was not unknown to them in their private transactions.

This silence of the Code of Justinian can perhaps be satisfactorily accounted for upon the theory that it was not intended to include the entire body of what we would call the common law of the empire, such as the customs, usages and the law merchant. We know that for over a thousand years Roman merchants carried on a commerce greater in volume than that of all Europe at the close of the seventeenth century,[11] and from this we infer that there must have been laws defining the relative rights and duties of the owners, seamen and masters of vessels. But nothing of the kind is found in the Code.

[7] See Emerigon Ins. (Meredith's ed.), ch. 1, § 1; Marshall Ins., Pref.

[8] Livy, L. 23, ch. 49, L. 25, ch. 3.

[9] Suetonius, L. 25, ch. 2.

[10] Similar plans for government insurance during maritime war are still urged. At the Rouen conference, 1900, of the International Law Association, it was stated that the merchants of Great Britain favored this system of government indemnity instead of the adoption of the present system of capture of private property. See address of Mr. Angiers, Report, p. 278. See also article "Ought the State to Cover Maritime War Risks?" by Sir John Glover in Contemporary Review for May, 1898.

[11] Cicero Epist. ad Attic. IV, ch. i, ii, iii.

It is probable that these matters were governed entirely by the customs of merchants, which were based upon rules adopted from the famous laws of the Rhodians.[12] We know that during the Middle Ages the maritime law of Europe was a body of customs developed by the merchants and enforced by arbitration and by special tribunals existing among themselves for the purpose of deciding their controversies without resort to the ordinary judicial tribunals. Probably the same was true in Rome, and if so, it explains the absence of any reference to the contract of insurance in the works of the Roman jurisconsults. Duer gives an ingenious explanation of the difficulty suggested by the full treatment of the analogous contracts of bottomry and respondentia. The Roman patricians and senators were the capitalists of the world, and, while not directly engaged in trade, were always willing to loan their money at high rates of interest to the merchants at home and in the provinces. These merchants, desiring large loans on bottomry, resorted to the gentlemen at Rome, and out of such large dealings there resulted controversies which naturally, at least after a time, came within the jurisdiction of the ordinary courts. The contract, not being subject to the usury laws, became a prime favorite with these patrician usurers, and the jurists, who belonged to the same class, soon created an elaborate body of rules for its government. Duer says:[13] "When Trebonian and his associates, under the auspices and orders of Justinian, commenced their labors, an ample code of maritime law, probably embracing all the subjects which they omitted, was not only in existence, but was in actual force as *law* throughout the empire, and had been so for ages."

These were the laws of Rhodes, framed in the days of her grandeur, when she claimed dominion over the sea. In the early years of Augustus these laws were adopted and declared a part of the laws of the empire.[14] In a subsequent age, Antoninus Pius, in a truly imperial edict, says: "The earth is subject to my dominion; the sea to that of the law. Let the case be determined by the Rhodian law on naval affairs, the provisions of which I direct to be observed in the future

[12] That the collection of laws purporting to be the laws of Rhodes are spurious, see Johnson's translation of Azuni, Vol. I, p. 286, note; Duer Mar. Ins. 26.

[13] Duer Mar. Ins. 24.

[14] Azuni says: "The celebrated Cujas maintains that in all maritime questions the Romans ought to adhere to the laws of Rhodes, if there is no particular law existing to the contrary, and this is in conformity with the direction of Augustus." Maritime Law, Vol. I, p. 271.

in all cases where they are not repugnant to the laws of Rome. The same decision was formerly made by the divine Augustus."

This edict was republished by Justinian and inserted in the Pandects. We thus find that the Rhodian sea laws were by reference and adoption incorporated into the code. They were already collected and published in an appropriate form, and further codification was therefore not necessary. No collection of these laws has come down to us, and they are known only by name.

It is thus more than probable that the Romans were familiar with the practice of insurance. They were bold navigators, and when we consider the character of their vessels, it is safe to assume that the risks and perils of the sea to which they subjected their cargoes were greater than those taken by modern commerce. Insurance seems to grow naturally out of an extensive commerce, and it is almost impossible to believe that without its protection the flourishing commerce of Tyre, Carthage, Corinth, Athens, Rhodes and Alexandria could have been successfully carried on through so many ages.

§ 3. **Its development on the Continent.**—It was during the Middle Ages, in connection with the rise of commerce, that insurance was first fully developed, if not invented, by the merchants of northern Italy. It has been suggested that it was brought into Italy by the Jews after their expulsion from France in 1182.[15] Emerigon says that the contract first received its name and form in Italy, although it had been known in substance in other places for many years. The common name of the contract is of Italian derivation, and means a memorandum in writing.[16] Reference has already been made to the famous sea laws which were promulgated during this period. It is impossible to fix the exact date when insurance began to be used, but it was in general use as early as the twelfth century.

§ 4. **Its growth in England.**—Certain writers claim that the practice of marine insurance was in use in England before it was known on the Continent. But it is practically certain that it was brought there by the Italian merchants who established themselves in Lombard street. For many years it was known only as a custom among merchants. By 1548 it had become so common that Lord

[15] See Duer Mar. Ins., Int. Disc., p. 30; Anderson History of Com. 82.

[16] Policy, Italian "polizza."

Bacon, in opening Elizabeth's first parliament, said: "Doth not the wise merchant, in every adventure of danger, give part to have the rest insured?" The first reported case as referred to by Lord Coke in *Dowdale's Case,* was decided in 1588.[17] It was held that "where as well the contract as the performance of it is wholly made or to be done beyond sea, it is not triable under our law, but if the promise be made in England it shall be tried." The idea still prevailed, however, that this peculiar contract of merchants, and the controversies arising out of it, should be construed by special tribunals, such as the famous Tribunal of the Mercanzia, which held its sessions at Florence and heard appeals in bankruptcy and insurance cases from all parts of Europe.

The first English statute relating to this subject is 43 Eliz., ch. 12, from which it is apparent that the contract was then well known in England, and also that it was customary to settle controversies arising thereunder by arbitration among merchants. The object of this statute was to prevent parties from resorting to the ordinary courts. It is recited that "of late years divers persons have withdrawn themselves from that arbitrary course and have sought to draw the parties assured, to seek their moneys of every several assurer,[18] by suits commenced in her Majesty's courts, to their great charges and delays."

Commenting on this, a well-known writer says that: "Before the passing of this act almost all disputes arising upon contracts of insurance were settled and adjusted by arbitration without resorting to any legal proceedings, and there seems to have been a particular tribunal for such arbitrations established in London composed of persons annually appointed by the lord mayor, in imitation of some such establishments in other countries." Malynes informs us that there was an office of assurance in the west side of the Royal Exchange where insurances were made, and to which belonged certain commissioners who were annually chosen and who were probably the grave and discreet merchants alluded to in the recital. The act also, somewhat inconsistently, recites: "Whereas, heretofore assurers have used to stand so justly on their credits, that few or no controversies have arisen thereupon; and if any have grown, the same have, from time to time, been ended and ordered by certain grave and discreet merchants appointed by the lord mayor of London, as men, by reason

[17] Dowdale's Case, 6 Coke 47b, 4 Inst. 142.

[18] It will be remembered that a risk might be underwritten by many individuals.

of their experience, fittest to understand, and speedily to decide those causes." It is further said, in the archaic language of the time: "Whereas, it ever hathe bene the policie of this realme by all good means to comforte and encourage the merchante, therebie to advance and increase the generall wealth of the realme, her Majestie's customes, and the Strength of Shippinge, which Consideracion is nowe the more requisite because trade and traffique is not at this present soe open as at other tymes it hathe bene. And, whereas it hathe bene tyme out of mynde an usage among the merchantes, both of this realme and of foraine nacyons, when they make any great adventure (especiallie into remote parts), to give some Consideration of money to other persons (which commonlie are in no small number), to have from them assurance made for their goodes, merchandize, ships and things adventured, or some parts thereof, at such rates and in such sorte as the parties assurers and the parties assured can agree, which course of dealinge is commonlie termed a policie of assurance," etc. This court, or rather commission, was composed of a judge of admiralty, the recorder of London, two doctors of the civil law, two common lawyers and eight grave and discreet merchants, or any five of them. Its powers were not exclusive and its judgments were no bar to an action at law, and finally "prohibitions to restrain them were issued and the court fell into disuse."[19]

Beginning with this statute, we find parliament, through numerous acts, regulating the contract and the manner of its making and enforcement.[20] Comparatively few cases arose, however, until the time of Lord Mansfield. This great jurist soon obtained control over such litigation and laid the foundations of the law upon those great principles by which it is still largely governed. Speaking of Mansfield's work in this respect, Marshall says:[21] "The great increase of insurance not only upon British commerce, but likewise upon that of other countries, produced about this time a number of causes upon this subject, to which it became necessary for him to turn his particular attention; and, indeed, he seems to have taken pleasure in the discussion of questions arising upon this contract, in which more, perhaps, than upon any other subject he displayed the powers of his great and comprehensive mind. From the books of the common law very little could be obtained, but upon the subject of marine law, and the particular

[19] 1 Smith Merc. Law (1890), ix.

[20] These statutes are collected in a note to Joyce Ins. 19.

[21] Marshall Ins. 28.

subject of insurances, the foreign authorities were numerous, and in general very satisfactory. From these, and from the information of intelligent merchants, he drew those leading principles which may be considered as the common law of the sea, and the common law of merchants, which he found prevailing throughout the commercial world, and to which almost every question of insurance was easily referable. Hence the great celebrity of his judgments upon such questions, and hence the respect they commanded in foreign countries."[22]

[22] Lord Campbell thus describes Lord Mansfield's methods: "When questions necessarily arose respecting the buying and selling of goods, respecting the affreightment of ships, respecting marine assurances, and respecting bills of exchange and promissory notes, no one knew how they were to be determined. Not a treatise had been published upon any of these subjects, and no cases respecting them were to be found in our books of reports, which swarmed with decisions about lords and villains, about marshaling the champions upon the trial of a writ of right by birth, and about the custom of manors whereby an unchaste widow might save the forfeiture of her dower by riding on a black ram and in plain language confessing her offense. Lord Hardwicke had done much to improve and systematize equity, but proceedings were still carried on in the courts of common law much in the same style as in the days of Sir Robert Tresilian and Sir William Gascoigne. Mercantile questions were so ignorantly treated, when they came into Westminster Hall, that they were usually settled by arbitration among the merchants themselves. If an action turning upon a mercantile question was brought in a court of law, the judges submitted it to the jury, who determined it according to their own notions of what was fair, and no general rule was laid down which could afterwards be referred to for the purpose of settling similar disputes. * * * He (Lord Mansfield) saw the noble field that lay before him, and he resolved to reap the rich harvest of glory which it presented to him. Instead of proceeding by legislation, and attempting to codify, * * * he wisely thought it more according to the genius of our institutions to introduce his improvements gradually, by way of judicial decision. As respected commerce, there were no vicious rules to be overturned—he had only to consider what was just, expedient, and sanctioned by the experience of nations farther advanced in the science of jurisprudence. His plan seems to have been to avail himself, as often as opportunity permitted, of his ample stores of knowledge, acquired from his study of the Roman Civil Law, and of the juridical writers produced in modern times by France, Germany, Holland and Italy, not only in doing justice to the parties litigating before him, but in settling with precision, and upon sound principles, a general rule, afterwards to be quoted and recognized as governing all similar cases. Being still in the prime of life, with a vigorous constitution, he, no doubt, fondly

No sketch, however brief, of the rise of the law of insurance in England is complete without a reference to Lloyds. Near the beginning of the eighteenth century one Lloyd opened a coffee-house in Abchurch lane, in London, which became a resort for merchants and others engaged in the maritime trade. Some of these were engaged in underwriting insurance, and the place soon became identified with them and their business. In 1696 the proprietor started a newspaper called "Lloyds News," which had for its object the dissemination of commercial intelligence, but departing from this field and printing certain proceedings of the house of lords, it fell under the displeasure of that body and was suppressed. In 1726 the paper was revived under the name of "Lloyds Lists," and under that name became famous in the commercial world. In 1669 the merchants, who were in the habit of meeting at Lloyds for the transaction of their business, formed themselves into a society, and adopted certain rules for their government. Soon after this organization was effected the society adopted a form of policy known as Lloyds policy, which is the basis of the policy now in use in England and America. It was customary among the merchants at the coffee-house to pass around a proposed policy, and each individual who cared to do so wrote his name thereon for the amount of the risk he was willing to assume. Finally, in 1871, the "Society of Lloyds" was incorporated, and it still exists as one of the great factors in commercial life.

§ 5. **Growth of insurance other than marine.**—It is a remarkable fact that only insurance against the perils of the sea was practiced, at least to any great extent, until within recent years. In a standard English work, which assumed to cover the entire subject of insurance, published in 1803, we find less than fifty pages devoted to all kinds of insurance other than marine insurance. In closing his discussion of life insurance, the learned author says: "I have now gone through all that seemed to be material upon the subject of insurance upon lives, from which it appears that many of the principles which govern marine insurances are also applicable to this contract. Considering the great multiplicity of insurances which have of late years been made upon lives, the number of litigated cases that have arisen upon them is extremely small. One principal reason is that the happening of the

hoped that he might live to see these decisions embracing the whole scope of commercial transactions, collected and methodized into a system which might bear his name."

event insured against is always a fact of easy proof, which can scarcely ever afford any subject of dispute. Another is the great difficulty of practicing any fraud in such insurances. But to no cause is this fortunate circumstance more to be ascribed than to the honor, integrity and liberality of the several companies engaged in this branch of insurance." The same writer considers it necessary to discuss the desirability and public policy of fire insurance. He says that, "I have not been able to ascertain the period of the introduction of insurance against fire in this country, but it has certainly been in use here considerably more than a century. Of late years, notwithstanding the very heavy stamp duty imposed on these insurances, they have been brought into very general—I might almost have said, universal—use in this country."[24]

The earliest English life insurance company was organized in 1706 under the name of the Amicable Society for a Perpetual Assurance Office. The plan was very simple. Only those between the ages of twelve and fifty-five were admitted, and all were required to make a fixed yearly contribution, which was divided among the representatives of those who died. There are some traces of life insurance to be found in very early times. It is certainly older than fire insurance. The earliest English stock company was organized in 1710, although a similar business had been carried on in London as early as 1681. The modern system of life insurance probably began with the Equitable Assurance Society of London, which commenced business in 1762. Very soon after this, in 1769, a company was organized in Pennsylvania for the purpose of providing protection for the families of Presbyterian clergymen.

The first American company was the Philadelphia Contributorship for Insuring Houses from Loss by Fire, which was incorporated by Benjamin Franklin and his associates in 1762.[25] The first reported case in this country was Lord v. Dall,[26] decided by the supreme court of Massachusetts in 1809, in which it was held that life insurance contracts were valid, although not authorized by statute. The principle of the mutual insurance system is of very ancient origin, and the modern form can well be connected with the ancient guilds and friendly societies. Similar organizations have been known since the earliest times,[27] but it is only within recent years that they have assumed their

[24] Marshall Ins. 679.

[25] 13 Enc. Brit. 161.

[26] 12 Mass. 115.

[27] Fortnightly Review (N. S.) 1864, p. 318; 9 Enc. Brit. 780.

present form. The first American life insurance case in which this kind of insurance was considered arose in Louisiana in 1871.[28] The first accident company was organized in London in 1849, and the practice of insuring real estate titles began in 1876. At present a company can be found ready to insure against almost every conceivable risk—from the merchant's ever-present perils of the sea to the surgeon's equally imminent danger from actions for malpractice.

[28] Wetmore v. Mutual, etc., Ins. Ass'n, 23 La. An. 770.

CHAPTER II.

DEFINITION, NATURE OF CONTRACT, AND MANNER OF ITS MAKING.

§ 6. **Definition.**—In the most general sense, insurance is a contract, for a consideration, to pay a sum of money upon the happening of a contemplated event. This may be an event which is certain to happen, such as death, or a mere possibility, such as fire or disaster at sea. Originally insurance was confined to protection against the dangers of the sea, but the different kinds have now become as common as the risks to which life and property are subject. If we except life insurance, which has features peculiar to itself, insurance may be defined as a contract where for a stipulated consideration one party undertakes to indemnify another against loss or damage on a designated subject-matter by certain contemplated perils. The kind of insurance is determined by the nature of the peril or of the subject-matter.[1]

[1] Numerous definitions are quoted in People v. Rose, 174 Ill. 310, Woodruff Ins. Cas. 16 (1898).

§ 7. **Different kinds of insurance.**—Fire insurance is a contract whereby one party, for a consideration, agrees to indemnify another against loss or damage to property by fire.

Life insurance is a contract whereby the insurer, in consideration of a certain sum, paid in gross or in annual payments, agrees to pay the person in whose favor the insurance is made a certain sum of money or an annuity in the event of the death of the person whose life is insured.

Accident insurance is a contract whereby one, for a consideration, agrees—

(*a*) to indemnify another against personal injury resulting from accidents, and

(*b*) to pay another a certain sum in case of the death of the insured, caused by accident.[1a]

Marine insurance is a contract of indemnity against loss occurring to the subject-matter of the policy from certain perils of the sea to which the ship, merchandise or other interest may be exposed during a certain voyage or a certain period of time.

Guaranty and fidelity insurance is insurance against loss arising from want of fidelity in employes, insolvency of debtors, negligence of employes resulting in personal injury to others, and many other similar risks.[2]

Casualty insurance is insurance against loss resulting in bodily injury or the destruction of certain kinds of property. A distinction, however, is generally made between accident and casualty insurance, by which the former is applied to injuries to the body caused by accident, and the latter to accidental injuries to property, such as boilers and plate glass.[3]

Endowment insurance is a contract to pay a certain sum to the in-

[1a] Healey v. Mutual Acc. Ass'n, 133 Ill. 556, 23 Am. St. 637 (1890). As to boiler insurance, see Laclede, etc., Co. v. Hartford, etc., Ins. Co., 60 Fed. 351, 9 C. C. A. 1 (1894).

[2] People v. Rose, 174 Ill. 310, Woodruff Ins. Cas. 16 (1898); State v. Federal Inv. Co., 48 Minn. 110 (1892). Insurance of fidelity of employe: See Fidelity, etc., Co. v. Eickhoff, 63 Minn. 170, 30 L. R. A. 586 (1895); Fidelity, etc., Co. v. Gate City Nat. Bank, 97 Ga. 634, 33 L. R. A. 821 (1896); Mechanics' Sav. Bank v. Guarantee Co., 68 Fed. 459. Insurance of employer from liability for negligence: See Anoka Lumber Co. v. Fidelity, etc., Co., 63 Minn. 286, 30 L. R. A. 689 (1895).

[3] Employers', etc., Corp. v. Merrill, 155 Mass. 404, Woodruff Ins. Cas. 15 (1892).

sured if he lives a certain length of time, or, if he dies before the time stated, to some person indicated in the contract.[4]

§ 8. **What constitutes insurance.**—The courts have in recent years had frequent occasion to determine whether certain corporations were engaged in the business of insurance. Numerous bonding, investment and gambling schemes have been organized in such a manner as to try and get the benefit of the idea of insurance and yet escape the restrictions imposed for the benefit and protection of the insured. Where the articles of incorporation provided "that the general nature of the business to be transacted by this corporation shall be to provide the means for profitably investing for certificate-holders small sums of money, to be paid in monthly installments until the sum so accumulated shall reach a sufficient amount to redeem in the order of their issuance all outstanding certificates of the company in force," the organization was held not to be an insurance company.[5] The court said "neither the times nor the amounts of payments by the assured, nor the modes of estimating or securing the payment of the sum to be paid by the insurance, are important or controlling in determining whether a transaction is a contract of insurance, but in order to render it such it must contain the essential element of indemnity for loss in respect to some specified subject from some specified risks; and, to constitute a contract, one of either a life, endowment or casualty insurance, the payment of the indemnity must be contingent either upon the duration of human life or the happening of a casualty resulting in bodily injury to the insured."

There are some events against which the policy of the law will not permit insurance. If the contract is in restraint of trade, or if it has a tendency to discourage matrimony, it can not be enforced. Thus, a corporation which agreed that if a member should pay an initiation fee and certain annual dues for nine years and until he was married, and also an assessment upon the marriage of any member,

[4] As to plans of endowment insurance, see Fuller v. Metropolitan L. Ins. Co., 37 Fed. 163 (1889). As to tontine insurance, see Pierce v. Equitable Ass. Soc., 145 Mass. 56 (1887); Uhlman v. New York L. Ins. Co., 109 N. Y. 421 (1888). As to title insurance, see Minnesota Title Ins. & T. Co. v. Drexel, 70 Fed. 194 (1895); Stensgaard v. St. Paul, etc., Ins. Co., 50 Minn. 429, 17 L. R. A. 575 (1892).

[5] State v. Federal Inv. Co., 48 Minn. 110 (1892). Benevolent association not for profit, not an insurance company: See Northwestern, etc., Ass'n v. Jones, 154 Pa. St. 99 (1893).

and agreed not to marry within two years, it would pay $1,000 to his wife out of a fund to be collected by assessment upon the members, is not an insurance company.[6]

In North Dakota it was recently held that a corporation which contracted to guarantee a fixed revenue per acre for farming lands, and as a means of doing so agreed to pay a stipulated sum per acre for the crop grown upon the land, irrespective of its value, was an insurance company within the meaning of the statute regulating foreign insurance companies. The contract was said to exactly meet the requirements of an insurance contract.[7] So, a contract which binds a company, in consideration of a sum paid, to purchase at a fixed price the accounts which during one year a certain business firm should have against certain ascertained insolvent debtors, or judgment debtors against whom execution should be returned unsatisfied, is an insurance contract.[8]

In reference to this contract, the Wisconsin court said:[9] "We regard the contract before us as unquestionably a contract of insurance. An insurance contract is a contract whereby one party agrees to wholly or partially indemnify another for the loss or damage from a specified peril. The peril of loss by insolvency of customers is just as definite and real a peril to a merchant or manufacturer as the peril or loss by accident, fire, lightning or tornado, and is in fact much more frequent. No reason is perceived why a contract of indemnity against this ever-present peril is not as legitimate a contract of insurance as a contract which indemnifies against the more familiar but less frequent peril of fire."

Guaranteeing the fidelity of officers and the performance of contracts is insurance within the meaning of a statute excepting the business of insurance from those for which corporations may be

[6] State v. Towle, 80 Me. 287 (1888). Contracts in restraint of marriage are void: See White v. Equitable, etc., Union, 76 Ala. 251 (1884); Chalfant v. Payton, 91 Ind. 202 (1883).

[7] State v. Hogan, 8 N. D. 301, 45 L. R. A. 166 (1899).

[8] Claflin v. U. S. Credit System Co., 165 Mass. 501 (1896) (under Mass. St. 1887, ch. 214).

[9] Shakman v. U. S. Credit System Co., 92 Wis. 366, 32 L. R. A. 383 (1896). See also Robertson v. U. S. Credit System Co., 57 N. J. L. 12, 23 Ins. L. J. 717 (1894); Smith v. National Credit Ins. Co., 65 Minn. 283, 33 L. R. A. 511 (1896); People v. Fidelity, etc., Co., 153 Ill. 25, 26 L. R. A. 295 (1894); Mercantile Credit Guarantee Co. v. Wood, 68 Fed. 529, 25 U. S. App. 381 (1895); Tebbets v. Mercantile Credit G. Co., 73 Fed. 95 (1896).

formed.[10] An incorporated association for the purpose of obtaining employment for the members while living, and to render pecuniary assistance to the families of deceased members through assessments upon the survivors, is an insurance company within the Minnesota statute.[11]

So a contract guaranteeing a party against the loss of a sum of money deposited in a bank is a contract of insurance.[12] But the inspection and certification of the sanitary condition of buildings is not insurance under the New York statute.[13]

§ 9. **Reinsurance.**—An insurer who has assumed risks which he does not care to carry may contract with another person to relieve him from such liability and assume it himself. Arnould says that "Reinsurance is a contract of insurance by which the original insurer becomes himself assured in respect of the same subject upon the same risk and under the same conditions as are expressed in the original policy."[14] Thus A, who has insured B, enters into a contract with C, whereby the latter, for a consideration agreed upon, insures A from loss by reason of his contract with B. Such contracts were at one time prohibited in England, but are now valid everywhere.[15] As the contract is one of indemnity, the reinsurance may be for an equal or less amount than the original, but can not be for more.[16] Difficulties arise when the original insurer becomes insolvent, is unable to pay the liability in full, or settles for a sum less than its liability. It is the reinsured, A, who is to be indemnified, and it would seem that where A settles a liability of $5,000 for $500, he should be allowed to recover but $500 from C. This seems to be the correct rule,[17]

[10] People v. Rose, 174 Ill. 310, 44 L. R. A. 124 (1898).

[11] Brown v. Balfour, 46 Minn. 68, 12 L. R. A. 373 (1891).

[12] Dane v. Mortgage Ins. Corp., L. R. (1894) 1 Q. B. 54.

[13] People v. Rosendale, 142 N. Y. 126, 36 N. E. 806, rev. 25 N. Y. Supp. 769 (1894) (under N. Y. Laws 1892, ch. 690, § 70).

[14] 1 Arnould Mar. Ins. (Maclachlan's ed., 1887) 103; Emerigon Ins., ch. 8, § 14; Boulay-Paty, 3 Droit-Mar. 329; 1 Phillips Ins., ch. 3, § 13. See § 340, *infra*.

[15] See note to Barnes v. Hekla F. Ins. Co., 56 Minn. 38, in 45 Am. St. 442.

[16] Philadelphia Ins. Co. v. Washington Ins. Co., 23 Pa. St. 250 (1854); Illinois, etc., Ins. Co. v. Andes Ins. Co., 67 Ill. 362 (1873); Imperial Fire Ins. Co. v. Home Ins. Co., 68 Fed. 698, 15 C. C. A. 609 (1895).

[17] Illinois Mut. F. Ins. Co. v. Andes Ins. Co., 67 Ill. 362 (1873).

but where A was insolvent, and had made no settlement with B, A's receiver recovered the full amount of A's liability from C.[18]

The reinsurance creates no contractual relation between the reinsurer and the original insured. Emerigon says:[19] "The original contract subsists precisely as it was made without renewal or alteration. The reinsurance is absolutely foreign to the first insured, with whom the reinsurer contracts no sort of obligation. The risks which the reinsurer has assumed constitute between him and the insurer a contract of reinsurance which is a new contract totally distinct from the first." The original insured has, therefore, no claim against the reinsurer, although his insurer has become insolvent.[20]

The reinsured recovers upon the same evidence as would have been produced against himself by the original insured,[21] and the reinsurer is entitled to the defenses which the original insurer could have asserted against the first insured.[22]

The contract of reinsurance must apply to the subject-matter of the original insurance and to risks of the kind specified in the original policy, although the specific risks need not be identical.[23] A contract of reinsurance of such marine risks may cover such risks as the insured had when it is made or may have during the risk. The policy will attach when the interest is acquired.[23a]

§ 10. **Parties.**—The parties to a contract of insurance are known as the insured and the insurer. As insurance is generally transacted by corporations, the insurer is commonly referred to as the company. The relation between the parties is one of contract merely, and their rights are measured by the terms of the written contract called the policy.[24] The parties must be legally competent to make a legal and binding contract.

[18] Cashau v. Northwestern, etc., Ins. Co., 5 Biss. 476 (1873); Ex parte Norwood, 3 Biss. 504 (1873); Hunt v. New Hampshire F., etc., Ass'n, 68 N. H. 305, 38 Atl. 145, 38 L. R. A. 514 (1895). See 1 May Ins. (3d ed.), § 11a.

[19] Emerigon Ins. (Meredith's ed.), ch. 8, § 14.

[20] Alauzet Traité des Assurance 152. But see cases cited at § 340, *infra*.

[21] 3 Kent's Com. (13th ed.), § 279, p. 402.

[22] See Gledstanes v. Royal Exch., etc., Corp., 34 L. J. (Q. B.) 30 (1864).

[23] See discussion in Imperial F. Ins. Co. v. Home Ins. Co., 68 Fed. 698, 15 C. C. A. 609 (1895).

[23a] Boston Ins. Co. v. Globe F. Ins. Co., 174 Mass. 229, 75 Am. St. 303 (1899).

[24] Uhlman v. N. Y. Life Ins. Co., 109 N. Y. 421, 4 Am. St. 482 (1888).

§ 11. The insured.—A person who is under any legal disability can not make a valid contract of insurance. Insurance against loss by fire is not a contract for necessities for which an infant may be held.[25] Such a contract is merely voidable at the option of the infant and is binding upon the company.[26] There is a conflict as to the right of a mutual insurance company to insure the life of an infant. It is said that it can not be done, as there could not be the mutuality of obligation which is at the foundation of every contract,[27] but the answer is that where there is no legal obligation to pay the dues, and a failure to do so merely results in loss of membership, the contract imposes no obligation upon the infant which he is not legally competent to perform.[28] The courts recognize the right of an infant to repudiate a contract of life insurance, but where it is manifestly for the benefit of the infant he is allowed to recover only the unearned portion of the premium which he has paid where an attempt was made to recover the entire amount of the premiums paid. The court said:[29] "Life insurance in a solvent company at the ordinary and usual rates, for an amount reasonably commensurate with the infant's estate and his financial ability to carry it, is a provident, fair and reasonable contract, and one which it is entirely proper for the insurance company to make with him, assuming that it practiced no fraud or other unlawful means to secure it; and if such should prove to be the character of this contract, the plaintiff could not recover the premiums which he has paid in so far as they were intended to cover the current annual risk assumed by the company under the policy."

An alien friend may make a valid contract of insurance, although an alien enemy, that is, a citizen of the country with whom the nation of the first party is at war, has no such capacity.[30]

[25] New Hampshire Mut. F. Ins. Co. v. Noyes, 32 N. H. 345 (1855). In Colorado it is a criminal offense to insure the life of a child under the age of ten years: Laws 1893, p. 118.

[26] Monaghan v. Agricultural F. Ins. Co., 53 Mich. 238 (1884).

[27] In re Globe Mut. Ben. Ass'n, 63 Hun (N. Y.) 263, 135 N. Y. 280, Woodruff Ins. Cas. 28 (1892). The receiving of an infant as a member of a co-operative or assessment insurance company may be prevented by injunction: See In re Globe Mut. Ben. Ass'n, 135 N. Y. 280, 17 L. R. A. 547 (1892).

[28] Chicago Mut. Life, etc., Ass'n v. Hunt, 127 Ill. 257 (1889). In Michigan an infant member of a society is made liable by statute for the payment of fees, and otherwise as if he were of full age: Howell Stat., § 7560.

[29] Johnson v. Northwestern Mut. Life Ins. Co., 56 Minn. 365, 59 N. W. 992, Woodruff Ins. Cas. 22 (1894).

[30] Clarke v. Morey, 10 Johns. (N.

Where a loss occurs after the death of the party insured, and before the appointment of an administrator, "the insured," for the purpose of giving notice and making proofs of loss, must be either the person who, in the course of time, will be appointed to administer the estate, or the persons interested in the estate who expect to benefit by the insurance. The former not being in existence, it is the duty of the latter to make all reasonable efforts to see that the covenants of the policy are complied with, and to use such agencies as the law provides to secure such results.[31]

§ **12. The insurer—Foreign corporations—State control.**—Originally all insurance contracts were made by individuals, but in modern times the business is conducted almost entirely by corporations organized under laws which provide for their creation and control. The business of insurance is not commerce, and hence is under the control of the states and not of the general government.[32]

A full consideration of these statutes does not fall within the scope of this work, and it is sufficient to say that all the states have laws which authorize the creation of corporations which, upon complying with the prescribed conditions, may make contracts of insurance against the various risks and dangers to which life and property are subject.

The state has full control over the business of insurance. It may permit it to be carried on by corporations only,[33] and it may prescribe the conditions upon which domestic or foreign corporations may engage in the business.[34] Foreign corporations may be entirely excluded from the state[35] or admitted upon such terms as are judged proper for the protection of the policy-holders within the state. These

Y.) 69 (1813). See note to 96 Am. Dec. 624–630. A license to trade may be granted to such alien: McStea v. Matthews, 50 N. Y. 166 (1872).

[31] Matthews v. American Cent. Ins. Co., 154 N. Y. 449, 39 L. R. A. 433 (1897).

[32] Paul v. Virginia, 8 Wall. (U. S.) 168 (1868); Hooper v. California, 155 U. S. 648 (1895).

[33] Com. v. Vrooman, 164 Pa. St. 306, 25 L. R. A. 250 (1894).

[34] As to the power to regulate and control the business of insurance companies already created, see Chicago L. Ins. Co. v. Needles, 113 U. S. 574 (1885); State v. Eagle Ins. Co., 50 Ohio St. 252, 33 N. E. 1056 (1893); State v. Ackerman, 51 Ohio St. 163, 24 L. R. A. 298 (1894), annotated.

[35] Daggs v. Orient Ins. Co., 136 Mo. 382, 58 Am. St. 638 (1896); Orient Ins. Co v. Daggs, 172 U. S. 557 (1899).

conditions may extend to the form and legal effect of the company's policy as well as to the general manner of the transaction of its business.[36] The conditions may be reasonable or unreasonable, as they are entirely within the control of the legislative department of the state.[37]

Where the business is confined to corporations, the prohibitions extend to citizens of other states as well as the home state. The business may be subjected to regulation, but when it is transacted by individuals there can be no discrimination between citizens of equal standing and merit.[38] By the weight of authority, the failure to comply with the conditions imposed by the state can not be shown as a defense to an action on a policy issued by the company which has not complied with the law.[39]

§ 13. Mutual companies and benevolent societies.—The original insurance companies were joint stock corporations, but in recent years many have been organized upon the mutual plan. Such companies are regulated by special statutes, but for certain purposes all are treated as insurance companies. In some states mutual companies do not

[36] Berry v. Knights, etc., Indemnity Co., 46 Fed. 439 (1891). See Com. v. Nutting, 175 Mass. 154, 78 Am. St. 483 (1900); State v. Fricke, 102 Wis. 107, 77 N. W. 732, 78 N. W. 455 (1898).

[37] Hartford Fire Ins. Co. v. Com'r of Ins., 70 Mich. 485 (1888). As to the retaliatory statutes in force in many of the states, see Elliott Priv. Corp. (3d ed.), § 249; People v. Fidelity, etc., Co., 153 Ill. 25, 26 L. R. A. 295 (1894).

[38] State v. Stone, 118 Mo. 388, 25 L. R. A. 243 (1893); Hoadley v. Purifoy, 107 Ala. 276, 30 L. R. A. 351 (1895). See further as to restrictions upon a business of individuals or unincorporated associations from another state: Com. v. Vrooman, 164 Pa. St. 306, 25 L. R. A. 250 (1894); Com. v. Reinoehl, 163 Pa. St. 287, 25 L. R. A. 247 (1894), and note in 25 L. R. A. 238.

[39] Ganser v. Fireman's Fund Ins. Co., 34 Minn. 372 (1885); Phenix Ins. Co. v. Pennsylvania R. Co., 134 Ind. 215, 20 L. R. A. 405 (1893), annotated. As to the right of a citizen of one state to make a contract of insurance outside of the state with a company which is not authorized to do business within the state, see Allgeyer v. Louisiana, 165 U. S. 578 (1897). As to the enforcement of contracts made by companies not authorized to transact business in a state, see Elliott Priv. Corp. (3d ed.), § 268; State Mut. F. Ins. Co. v. Brinkley, etc., Co., 61 Ark. 1, 29 L. R. A. 712 (1895); Pennypacker v. Capital Ins. Co., 80 Iowa 56, 8 L. R. A. 236 (1890). Contract made by mail by such a company: Rose v. Kimberly, etc., Co., 89 Wis. 545, 27 L. R. A. 556 (1895); Seamans v. Temple Co., 105 Mich. 400, 28 L. R. A. 430 (1895).

come under the statutes, which are intended for the general regulation of insurance companies.

Another form of organization is known as the mutual benevolent associations. Certain privileges and exemptions are granted to these organizations, which, although in one sense insurance companies, are supposed to be so saturated with the spirit of benevolence and philanthropy as to make them the favorites of the law, and to justify their exemption from the strict provisions of the law governing insurance corporations. In some instances persons have chosen this statutory livery of benevolence to serve themselves in, with the usual result. It requires close scrutiny to discover any element of benevolence in the contracts issued by many of these institutions. Of one such the court said:[40] "It is apparent from an examination of the charter and its method of doing business that it is a mutual life insurance company on the assessment plan. Its business is insurance and nothing else. There is not a social, charitable or benevolent feature in its organization or the conduct of its business. It has no lodges, pays no sick dues, distributes no aid, and gives no attention to members in distress or poverty. It deals with its members on the strictest business principles. The policy-holders get nothing for which full value has not been paid by the assured, but the assured may pay much and the policy-holder recover nothing by reason of the forfeiture of the policy for a violation of some one of its numerous conditions."

It is sometimes a question whether such organizations are engaged in the insurance business within the meaning of the law, and if so whether they should be required to comply with the statutory conditions imposed upon insurance companies. When they are properly organized for benevolent and protective purposes under special statutes, they are not governed by the general laws regulating the business of insurance.[41] It is generally held that certificates of such associations do not constitute "other insurance" within the meaning of the question in the application.[42]

[40] Berry v. Knights, etc., Indemnity Co., 46 Fed. 439 (1891). See also National Union v. Marlow, 74 Fed. 775, 21 C. C. A. 89 (1896), and cases there cited.

[41] Com. v. Equitable Ben. Ass'n, 137 Pa. St. 412, 18 Atl. 1112 (1890); State v. Whitmore, 75 Wis. 332 (1889); Commercial League Ass'n v. People, 90 Ill. 166 (1878); State v. Bankers', etc., Ass'n, 23 Kan. 499 (1880). See National Union v. Marlow, 74 Fed. 775, 21 C. C. A. 89 (1896) (under Mo. Stat. 1889, ch. 42, art. 10).

[42] See Penn Mut. L. Ins. Co. v.

These matters are now generally regulated by statute. In Iowa it was held that where the main purpose is that of life insurance, or insurance against sickness and disability, the company is amenable to the laws of the state relating to insurance corporations, and must, therefore, comply with the statutory requirements relating to insurance companies organized in other states.[44] In Michigan it was said that as an insurance contract is an agreement by which one party, for a consideration, promises to make a certain payment of money upon the destruction or injury of something in which the other party has an interest, all mutual benefit and co-operative associations or mere voluntary associations are, strictly speaking, insurance organizations, whenever, in consideration of periodical contributions, they engage to pay the member or his designated beneficiary a benefit upon the happening of a specified contingency.[45]

An association organized for benevolent purposes, under the supervision of a supreme body, which secured its members by the lodge system, on application and after a satisfactory medical examination, required an initiation fee and assessments, and which, in the case of accidental disability, paid a weekly amount, and upon the death of a member, to be shown by proper proof, returned the amount of the assessment paid, less benefits received, was held not a life insurance company within the meaning of the statutes requiring such companies doing business in the state to make a deposit with the state treasurer.[46]

A corporation organized "to give financial aid and benefit to the widows, orphans and heirs or devisees of deceased members," and declared by statute not to be an insurance corporation, can not contract for endowment insurance payable to a member when he reaches a certain age.[47]

§ 14. **The risk.**—It is essential to every contract of insurance that there should be a risk to which the subject-matter is, or may be, subjected, and this risk should be a real one, which neither the insured nor the company has power to avert or hasten. "It is of the very es-

Mechanics', etc., Co., 43 U. S. App. 75, 38 L. R. A. 33 (1896), annotated.

[44] State v. Nichols, 78 Iowa 747 (1888).

[45] Rensenhouse v. Seeley, 72 Mich. 603, 40 N. W. 765 (1888).

[46] Rensenhouse v. Seeley, 72 Mich. 603 (1888).

[47] Rockhold v. Canton Mas. Mut. B. Ass'n, 129 Ill. 440, 2 L. R. A. 420 (1889).

sence of insurance and forms the principal foundation of the contract * * * the insurer takes upon himself the peril which the property or interest of others is liable to encounter. The very life of the contract involves the presumption that the thing is or will be exposed to some danger."[48]

As already stated, the risks which may be insured against are too numerous to be named. Any contingent or unknown event, whether past or future, which may damnify a person having an insurable interest or create a liability against him, may be insured against. Whatever has an appreciable pecuniary value and is subject to loss or deterioration, or of which one may be deprived, or that he may fail to realize, whereby his pecuniary interest is or may be prejudiced, may properly constitute the subject-matter of insurance. This rule, however, is subject to the limitation that whatever the law discourages or disapproves of, whether by special statute or on the general principles enforced by the common law in the interest of good morals and good order and general public policy, will not be encouraged by insurance.[49]

The contract attaches to the interest and not to the property. This interest must be in a kind of property which the law permits a person to own or in a business enterprise which is lawful and consistent with the policy of the law. Thus, a valid contract can not be made for the protection of an interest in a lottery or other gambling enterprise, as a contract insuring an illegal business is void. Thus, a contract insuring a person engaged in selling liquor against the danger of a fine or a forfeiture of a license is invalid. But the general rule is that an interest in property which the law permits a party to own and use under certain restrictions, although the property is in fact being illegally used, may be insured. A contract of insurance against a stock of liquors illegally kept for sale is generally held valid. It was said in Michigan:[50] "By insuring his property the insurance company had no concern with the use which he made of it, and as it is susceptible of lawful use, no one can be held to contract concerning it in an illegal manner, unless the contract itself is for a directly illegal purpose.

[48] 1 Joyce Ins., § 16.

[49] 1 May Ins., § 71; 1 Duer Ins., § 3. See Phenix Ins. Co. v. Clay, 101 Ga. 331, 65 Am. St. 307 (1897).

[50] Niagara F. Ins. Co. v. DeGraff, 12 Mich. 124 (1863); People's Ins. Co. v. Spencer, 53 Pa. St. 353 (1866); Erb v. German-Amer. Ins. Co., 98 Iowa 606, 40 L. R. A. 845 (1898), annotated; Carrigan v. Lycoming F. Ins. Co., 53 Vt. 418, 38 Am. Rep. 687 (1881). In Massachusetts an insurance upon liquors illegally kept for sale is void: Lawrence v. National F. Ins. Co., 127 Mass. 557 (1880); but sales made

Collateral contracts in which no illegal design enters are not affected by an illegal transaction with which they may be remotely connected." It was recently held that an English company could legally insure the property of a foreigner from capture by the government of the insurer in contemplation of war between the countries of the insurer and the insured.[50a]

§ 15. **A personal contract.**—The contract of insurance has certain characteristic features to which attention should be called. Thus, it is personal, and does not, unless expressly so provided, run with the property. It protects the person and not the thing in which he is interested. It does not pass with the title of the property,[51] but in this respect a distinction must be noted between a contract of insurance and a covenant to insure made between parties relative to land.[52] In *Sadler's Case*,[53] Lord Hardwicke said: "To whom, or for what loss are they to make satisfaction? Why, to the person insured and for the loss he may have sustained, but it can not properly be called insuring the thing, for there is no possibility of it, and, therefore, must mean insuring the person from damage." In another early case[54] it was said: "These policies are no insurance on the specific things mentioned to be insured, nor do such insurances attach to the realty or in any manner go with the same as incident thereto by any conveyance or assignment, but they are only special agreements with the person insuring against such loss or damage as they may sustain. The party insured must have the property at the time of the loss, or he can sustain no loss, and consequently can be entitled to no satisfaction."

§ 16. **A conditional contract.**—The contract is also conditional. Thus, it does not become binding until the subject-matter is subjected to the perils insured against. The risks "are the occasion of the contract being made, and without exposure to them it never applies."[55]

during a brief period of expiration of license will not invalidate a policy: Hinckley v. Germania F. Ins. Co., 140 Mass. 38 (1885).

[50a] Driefontein, etc., Mines v. Jansen, L. R. (1901) 2 K. B. 419. The decision is a departure from well settled principles.

[51] Quarles v. Clayton, 87 Tenn. 308 (1889); Carpenter v. Providence-Washington Ins. Co., 16 Peters (U. S.) 495 (1842); Lett v. Guardian F. Ins. Co., 125 N. Y. 82 (1890); McDonald v. Black, 20 Ohio 185, 55 Am. Dec. 449 (1851).

[52] Thomas v. Vankapff, 6 Gill & J. (Md.) 372 (1834).

[53] Sadler Co. v. Badcock, 2 Atk. 554 (1743).

[54] Lynch v. Dalzel, 3 Bro. Cas. Parl. 497, quoted in Park. Ins. 453.

[55] 1 Arnould Mar. Ins. 16.

"Hence," said Lord Mansfield, "where the risk has not been run, whether its not being run was owing to the fault, pleasure or will of the insured, or to any other cause, the premium shall be returned." Many other conditional provisions are found in insurance contracts.[56]

§ 17. **An aleatory contract.**—In an ordinary contract the thing given or done by one party is considered as an equivalent of what is given or done by the other, but an element of wager enters into every insurance contract. If no loss occurs, the insurer gains the amount of the premium; if loss occurs, the insured receives the amount of his loss, which is generally much greater than the premium. By reason of this element of chance the contract is said to be aleatory.

§ 18. **Indemnity.**—The fundamental principle at the base of every contract of insurance affecting an interest in property is that of indemnity.[57] This means that the object of the contract is, in the event of loss, to place the insured as nearly as possible within the terms and conditions of the policy, in the same situation as before the loss. The value of the interest may be determined after the loss, or by the contract.

A policy of insurance is not a perfect contract of indemnity, and the general statement must be taken with this qualification, that the parties may agree beforehand in estimating the value of the subject or of the interest by way of liquidated damages.[58] Where the valuation is previously determined and inserted in the contract it will be taken as conclusive in the absence of gross or fraudulent overvaluation. Reinsurance is a contract of indemnity.[59]

§ 19. **Life insurance not a contract of indemnity.**—After much discussion it is now well settled that life insurance is not a contract of indemnity, but simply a contract in consideration of a fixed payment annually or otherwise, as determined by the contract, to pay a

[56] See Cooledge v. Continental Ins. Co., 67 Vt. 14 (1894).

[57] The principle is so well established as scarcely to require the citation of authorities. See, generally, Castellain v. Preston, L. R. 11 Q. B. D. 380; McDonald v. Black, 20 Ohio 185, 55 Am. Dec. 448 (1851). See article on "Indemnity the Essence of Insurance," Proc. Am. Bar Ass'n, 1887, p. 261; Wilson v. Hill, 3 Met. (Mass.) 66, Woodruff Ins. Cas. 1 (1841).

[58] Irving v. Manning, 1 H. L. Cas. 287 (1847).

[59] Eagle Ins. Co. v. Lafayette Ins. Co., 9 Ind. 443 (1857); Bartlett v. Fireman's Fund Ins. Co., 77 Iowa 155 (1889).

greater sum upon the happening of a future, certain event. It very much resembles a fire or marine valued policy, and the early decisions treated it as a contract of indemnity and held that a creditor who had insured the life of his debtor could not recover on the policy where the executors paid the debt after the death of the debtor and before an action was brought on the policy.[60] But this decision was unsatisfactory to the courts and the business community,[61] and was finally reversed in a carefully considered case, where it was squarely decided that a contract of life insurance in no way resembled a contract of indemnity.[62] It was said that such a contract "really is what it is on the face of it, a contract to pay a certain sum in the event of death. It is valid at the common law, and if it is made by a person having an interest in the duration of the life it is not prohibited by the statute." It is unnecessary to discuss the reasons which have led most of our courts to accept the view that life insurance is not a contract of indemnity, as the controversy is now practically closed and the leading decisions are cited in the notes.[63] The difficulty is in disposing of cases where creditors insure the lives of their debtors for the purpose of securing the payment of their debts. Respectable authorities hold with much force and reason that such contracts are for indemnity only,[64] and statements are occasionally found to the effect that all insurance contracts are contracts of indemnity.[65]

[60] Godsall v. Boldero, 9 East 72 (1807).

[61] See Bunyan Life Ins., § 7.

[62] Dalby v. India, etc., Assur. Co., 15 C. B. 365 (1854).

[63] That life insurance is not a contract of indemnity, see Dalby v. India, etc., Assur. Co., 15 C. B. 365 (1854); Scott v. Dickson, 108 Pa. St. 6, 56 Am. Rep. 192 (1884); Mutual L. Ins. Co. v. Allen, 138 Mass. 24, 52 Am. Rep. 246 (1884); Emerick v. Coakley, 35 Md. 188 (1871); Nye v. Grand Lodge, 9 Ind. App. 131 (1894).

[64] Exchange Bank v. Loh, 104 Ga. 446, 44 L. R. A. 372 (1898); Miller v. Eagle, etc., Ins. Co., 2 E. D. Smith (N. Y.) 294 (1854). In Cooper v. Shaeffer (Pa.), 11 Atl. 548 (1887), it was held that where the disproportion between the amount of the insurance and the debt is gross, the policy is void as a wager policy. See Grant v. Kline, 115 Pa. St. 618 (1887), and cases at section 66, *infra*.

[65] So eminent a jurist as Mr. Justice Mitchell recently said: "The very essence of any definition of insurance is indemnity for loss in respect of a specified subject. The contract of life insurance or of insurance upon a life in the ordinary form is a contract to pay a certain sum of money on the death of the insured:" State v. Federal Inv. Co., 48 Minn. 110. See also Kennedy v. New York Life Ins. Co., 10 La. An. 809 (1855); Bevin v. Connecticut Mut. L. Ins. Co., 23 Conn. 244 (1854); May Ins. (3d ed.), § 7.

§ 20. **Indemnity in accident insurance.**—An accident insurance policy is a contract of indemnity in so far, at least, as it protects against personal injury resulting from accident; but it resembles an ordinary life insurance contract in so far as it provides for the payment to another person of a fixed sum in case of death by accident. Death covered by an ordinary life policy is certain to occur, but death by accident is no more liable to occur than loss by fire under a fire insurance contract. In Illinois it was recently said that "a policy of accident insurance is issued and accepted for the purpose of furnishing indemnity against accidents, or death caused by accidental means."[66]

§ 21. **Subrogation.**—As a result of the principle of indemnity, the doctrine of subrogation applies to a fire or marine insurance contract. "In fire insurance as well as in marine insurance," says Mr. Justice Gray,[67] "the insurer, upon paying to the assured the amount of a loss on the property insured, is doubtless subrogated in a corresponding amount to the assured's right of action against any other person responsible for the loss. But the right of the insurer against such other person does not arise upon any relation of contract or privity between them. It arises out of the nature of the contract of insurance as a contract of indemnity, and is derived from the assured alone and can be enforced in his right only. By the strict rules of the common law it must be asserted in the name of the assured; in a court of equity or of admiralty, or under some of the state codes, it may be asserted by the insurer in his own name, but in any form of remedy the insurer can take nothing by subrogation but the rights of the assured, and if the assured has no right of action, none passes to the insurer."

§ 22. **Loss caused by negligence.**—A contract of insurance covers a loss occasioned by the negligence of the insured, unless the negligence is so gross as to show an evil intent.[68] If the loss is caused by

[66] Healey v. Mutual Acc. Ass'n, 133 Ill. 556, 23 Am. St. 637 (1890). See Employers', etc., Corp. v. Merrill, 155 Mass. 404 (1892).

[67] St. Louis, etc., R. Co. v. Commercial, etc., Ins. Co., 139 U. S. 223, 235 (1890). See § 339, *infra.*

[68] Angier v. Western Assur. Co., 10 S. D. 82, 66 Am. St. 685 (1897); Pool v. Milwaukee, etc., Ins. Co., 91 Wis. 530, 51 Am. St. 919 (1895); Richelieu, etc., Co. v. Boston, etc., Ins. Co., 136 U. S. 408 (1889). See Union Ins. Co. v. Smith, 124 U. S. 405 (1888).

some one other than the insured, the wrongdoer must not be released without the consent of the insurer, as such a release would bar the right of action upon the insurance contract.[69] So, where the wrongdoer pays the insured with knowledge of the fact that the insurer has made a payment under the policy, it is a fraud upon the insurer, and will not protect the wrongdoer.[70]

§ 23. **Form of the contract.**—It is customary to reduce the contract of insurance to writing, but this is not necessary unless required by statute, as a parol contract of insurance is valid.[71] An oral contract of insurance was good at common law. Emerigon says:[72] "Valin and Pothier agree in saying that in insurance a writing is only required for the proof of the contract; that the writing is extrinsic to the substance of the agreement. They are reduced to writing for the purpose of more easily preserving their proof. * * * But the common law rule ceases its operation in all cases where a writing is expressly required by law." It has been held that an oral contract of insurance is invalid, but at the present time "the rule is well settled that the policy is only evidence of the contract, and the latter may be shown by parol when the policy has not been written, or is withheld, unless such contract is forbidden by statute or a provision in the company's charter which is brought to the notice of the other contracting party. And, as in other cases of parol contracts, the terms of the agreement and the assent of the parties may be

[69] Newcomb v. Cincinnati Ins. Co., 22 Ohio St. 382 (1872); Hall v. Railroad Co., 13 Wall (U. S.) 367 (1871).

[70] Connecticut F. Ins. Co. v. Erie R. Co., 73 N. Y. 399 (1878). See Allen v. Chicago, etc., R. Co., 94 Wis. 93, 68 N. W. 873 (1896).

[71] Trustees v. Brooklyn F. Ins. Co., 19 N. Y. 305 (1859); Fish v. Cottenet, 44 N. Y. 538, 4 Am. Rep. 915 (1871); Ruggles v. American Cent. Ins. Co., 114 N. Y. 415 (1889); British Ins. Co. v. Lambert, 26 Ore. 199 (1894); Croft v. Hanover F. Ins. Co., 40 W. Va. 508, 21 S. E. 854 (1895); Emery v. Boston Mar. Ins. Co., 138 Mass. 398 (1885); Ganser v. Fireman's Fund Ins. Co., 34 Minn. 372 (1885), 38 Minn. 74 (1887). In Cockerill v. Cincinnati, etc., Ins. Co., 16 Ohio 148 (1847), it was held that a contract of insurance must be in writing; but the case was reversed in Dayton Ins. Co. v. Kelly, 24 Ohio St. 345, 15 Am. Rep. 612 (1873). As to the validity of an oral contract of insurance, see Newark Mach. Co. v. Kenton Ins. Co., 50 Ohio St. 549, 22 L. R. A. 768, and note (1893). In a number of states there are statutes providing that a contract of insurance need not be under seal.

[72] Emerigon Ins. (Meredith's ed., 1850) 25.

shown by their acts and the attending circumstances as well as by the words they have employed."[73]

In view of the custom of insurance companies of using written policies, there is a strong presumption where no policy has been issued and no premium paid that no contract has been entered into.[74]

§ 24. Statutory form—Conditions implied in an oral contract.—Many states now prescribe a form of contract known as the standard policy, but these requirements do not change the rule, and an oral contract is binding if it can be proven by satisfactory evidence. A parol contract to insure or for insurance is, unless other terms are agreed upon, construed as an agreement to insure upon the terms expressed in the written policy ordinarily used by the company.[75] Where a standard policy is required an oral contract is presumed to contemplate insurance upon the terms and subject to the conditions of such policy. Hence, the rights of one whose property is destroyed by fire after an oral contract to insure, but before the policy is issued, are subject to the provisions of the standard policy, and he can recover only upon compliance with the conditions required by such policy. "The contract of insurance," says Chief Justice Parker,[76] "although verbal, embraced within it the provisions of the standard policy of fire insurance which the legislature in its wisdom formulated for the protection of both the insured and the insurer. It is usual for the company to issue a policy evidencing the contract between the par-

[73] Newark Mach. Co. v. Kenton Ins. Co., 50 Ohio St. 549, 22 L. R. A. 768 (1893), annotated.

[74] Equitable L. Assur. Soc. v. McElroy, 83 Fed. 631, 28 C. C. A. 365 (1897); Heiman v. Phœnix, etc., Ins. Co., 17 Minn. 153, Gil. 127 (1871).

[75] Lipman v. Niagara F. Ins. Co., 121 N. Y. 454, 8 L. R. A. 719 (1890); Karelsen v. Sun Fire Office, 122 N. Y. 545 (1890); Salisbury v. Hekla Fire Ins. Co., 32 Minn. 458 (1884); Barre v. Council Bluffs Ins. Co., 76 Iowa 609 (1889); Eames v. Home Ins. Co., 94 U. S. 621 (1876); Newark Mach. Co. v. Kenton Ins. Co., 50 Ohio St. 549 (1893).

[76] Hicks v. British Amer. Ass. Co., 162 N. Y. 284, 48 L. R. A. 424 (1900). A policy issued in pursuance of an oral contract to insure will be presumed to embody all the terms of the contract, and in the absence of fraud or mistake will be conclusive as to the terms of such contract: McLaughlin v. Equitable L. Assur. Soc., 38 Neb. 725, 57 N. W. 557 (1894). But a parol contract to issue a policy is not merged in a written policy which does not cover all the terms of the parol contract: Nebraska, etc., Ins. Co. v. Seivers, 27 Neb. 541, 43 N. W. 351 (1889).

ties, but the policy accomplishes nothing more than that, for when the contract is entered into between the agent and the owner, whether the binder be verbal or in writing, it includes within it the standard form of policy and the contract is a completed one."

§ 25. **Statute of frauds.**—A contract of insurance is not within the provisions of the statute of frauds which requires "every agreement which by its terms is not to be performed within one year from the making thereof to be in writing." The thing to be done under such a contract depends upon a contingency which may happen within one year.[77] So, an agreement to make a policy or renew a policy or a contract of reinsurance is not within the statute.[78]

§ 26. **Renewal by parol.**—An existing written policy of insurance may be renewed by parol. An insurance company can not limit its power of action by a provision in a policy that the power that made the contract can not modify it. Hence, a policy may be renewed by a parol agreement of an authorized agent of the company, although it contains a provision that it shall not be so renewed. The making of the parol agreement amounts to a waiver of the provisions in the policy.[79]

§ 27. **Effect of charter provisions.**—There are cases which hold that where the charter of an insurance company requires the contract to be in writing, it has not the power to make an oral contract of insurance.[80] Where the insured has knowledge of the limitations contained in the corporate charter, it is reasonable that he should be bound thereby, but it is difficult to state general rules applicable to all cases. Charter provisions relating to the execution of a policy should

[77] Sanford v. Orient Ins. Co., 174 Mass. 416, 75 Am. St. 358 (1899); Commercial, etc., Ins. Co. v. Union M. Ins. Co., 19 How. (U. S.) 318 (1856).

[78] Wiebeler v. Milwaukee, etc., Ins. Co., 30 Minn. 464 (1883); Sanborn v. Fireman's Ins. Co., 16 Gray (Mass.) 448, 77 Am. Dec. 419 (1860); Howard Ins. Co. v. Owen, 94 Ky. 197 (1893); Walker v. Metropolitan Ins. Co., 56 Me. 371 (1868).

[79] Cohen v. Continental, etc., Ins. Co., 67 Tex. 325, 6 Am. Rep. 324 (1887). See Royal Ins. Co. v. Beatty, 119 Pa. St. 6 (1888).

[80] Head v. Providence Ins. Co., 2 Cranch (U. S.) 127, 150 (1804); Spitzer v. St. Mark's Ins. Co., 6 Duer (N. Y.) 6 (1855); but see Ins. Co. v. Colt, 20 Wall. (U. S.) 560 (1874).

not, in the absence of words of restriction or a plain denial of such power, be construed to limit the power of the corporation or to prevent it from making parol contracts within the ordinary scope of its charter powers.[81]

A statute which requires all policies to be signed by the president and countersigned by the secretary of the corporation will not prevent the making of a valid oral contract to insure.[82] Although the charter limited the power of the corporation to make valid insurance by a policy not under seal and signed by the president and secretary, it was held that, before a policy was executed, a general agent of the company might make a parol agreement that a policy would be issued, and that a court of equity would compel the corporation specifically to perform such an agreement.[83]

§ 28. **Revenue stamps.**—A statute which requires an insurance policy to bear a revenue stamp is generally held not to affect the validity of the contract. If such contracts are in fact reduced to writing, they require a stamp under the federal statute, but the great majority of the state courts hold that the laws of congress in regard to the admission of unstamped instruments in evidence apply only to the federal courts.[84] There is certainly serious doubt as to the power of congress to declare a contract void because it does not bear a proper revenue stamp. "It has been repeatedly decided," says Judge Cooley,[85] "that the act of congress which provided that certain papers not stamped should not be received in evidence must be limited in its

[81] See 1 Joyce Ins., § 35.

[82] Sanborn v. Fireman's Ins. Co., 16 Gray (Mass.) 448, 77 Am. Dec. 419 (1860); Commercial, etc., Ins. Co. v. Union Mut. Ins. Co., 19 How. (U. S.) 318 (1856); Hening v. U. S. Ins. Co., 2 Dill. (C. C.) 26 (1872). *Contra*, Henning v. U. S. Ins. Co., 47 Mo. 425, 4 Am. Rep. 332 (1871).

[83] Constant v. Ins. Co., 3 Wall. Jr. (C. C.) 313 (1861); Security Fire Ins. Co. v. Kentucky, etc., Ins. Co., 7 Bush (Ky.) 81, 3 Am. Rep. 301 (1869).

[84] Southern Ins. Co. v. North British, etc., Ins. Co. (Tenn.), 52 L. R. A. 915 (1901); Knox v. Rossi (Nev.), 48 L. R. A. 305, note, 57 Pac. 179 (1900); Wingert v. Zeigler (Md.), 51 L. R. A. 316 (1900); Carpenter v. Snelling, 97 Mass. 452 (1867). Unless stamp was omitted with intent to defraud: Green v. Holway, 101 Mass. 243 (1869); Hitchcock v. Sawyer, 39 Vt. 412 (1867); Griffin v. Ranney, 35 Conn. 239 (1868). The leading case holding the contrary is Chartiers Co. v. McNamara, 72 Pa. St. 278, 13 Am. Rep. 673 (1872).

[85] Cooley Const. Lim. (5th ed., 1883) 599, note.

operation to the federal courts. Several of these cases have gone still farther and declared that congress can not preclude parties from entering into contracts permitted by the state laws, and that to declare them void is not the proper penalty for the enforcement of a tax law."

§ 29. **Enforcement of oral contract.**—A valid oral contract to insure may be either specifically enforced, or the court may award damages as in an action upon the policy.[86] Where the negotiations have reached a point where nothing remains for either party but to execute what has been agreed upon, the courts will usually compel the issuance of the policy and the indemnification of the insured. Where it appeared that a voyage was undertaken with the understanding that the risk had been accepted by the insurer, and that the policy would be issued and the premium paid when demanded, it was said:[87] "It is well established that upon clear proof to do something, the consummation of which involves the execution of a written instrument, which is afterwards refused to be made, a court of equity will coerce the execution of the written contract which the parol evidence has shown to be agreed upon."

§ 30. **Kinds of policies.**—The various kinds of insurance policies are classified as open or valued, wager or interest, time or voyage.

A valued policy is one in which the amount of the indemnity to be paid in the event of loss is fixed by the terms of the contract. An open policy is one in which the sum to be paid is left to be determined in the event of a loss. Under the former the actual value of the subject-matter need not be proved, as the sum agreed upon is conclusive unless it appears that there was fraud or such excessive overvaluation as in itself to raise the presumption of fraud.[88] A policy may be open as to certain articles and valued as to others.[89]

[86] Security Fire Ins. Co. v. Kentucky, etc., Ins. Co., 7 Bush (Ky.) 81, 3 Am. Rep. 301 (1869); Gerrish v. German Ins. Co., 55 N. H. 355 (1875).

[87] Phœnix Ins. Co. v. Ryland, 69 Md. 437, 16 Atl. 109 (1888). See also Wooddy v. Old Dominion Ins. Co., 31 Gratt. (Va.) 362 (1879).

[88] Alsop v. Commercial Ins. Co., 1 Sumn. (C. C.) 451 (1833); Cushman v. Northwestern Ins. Co., 34 Me. 487 (1852); Borden v. Hingham, etc., Ins. Co., 18 Pick. (Mass.) 523 (1836). In many states all policies are required by statute to be valued. See § 333, *infra*. As to the policy of such legislation, see a paper in Proc. Am. Bar Ass'n, 1887, by Hervey Jackson, Esq.

[89] Post v. Hampshire, etc., Ins. Co., 12 Metc. (Mass.) 555 (1847).

A wager policy is one in which it appears by its terms that the insured has no interest in the subject-matter of the insurance. It is a disputed question whether such policies were valid at the common law, but however that may have been, they are now universally prohibited.

An interest policy is one in which it appears by its terms that the insured has an interest in the subject-matter.[90]

A time policy is one in which the duration of the risk is fixed for a definite period of time.

A voyage policy is one in which the duration of the risk is determined by geographical limits. It is applicable to transportation upon land or water.[91]

§ 31. **Completion of the contract—Delivery of the policy.**—A contract of insurance is completed when the terms have been agreed upon between the parties. The reciprocal rights and obligations of the parties date from that time, without reference to the execution and delivery of the policy, unless these elements are embraced within the terms agreed upon, or the statute makes such a delivery a condition precedent to the validity of the contract.[92]

If there has been no payment of the premium and no delivery of the policy, the contract is *prima facie* incomplete, and the party claiming the existence of a contract must show that it was the intention of the parties that there should be an operative contract.[93]

It is ordinarily necessary that the policy should be delivered before the contract is binding upon the insurance company, unless the facts are such as to entitle the party to recover upon an oral contract to insure or of insurance. This does not, however, require actual manual delivery, as an agreement upon all the terms and the issue and transmission to the agent of the company for delivery without conditions are equivalent to delivery to the insured.[94]

[90] Williams v. Smith, 2 Caines (N. Y.) 13, and note (1804); Alsop v. Commercial Ins. Co., 1 Sumn. (C. C.) 451 (1833).

[91] Boehm v. Combe, 2 Maule & S. 172 (1813).

[92] Western Assur. Co. v. McAlpin, 23 Ind. App. 220, 77 Am. St. 423 (1899).

[93] Faunce v. State, etc., Assur. Co., 101 Mass. 279 (1869); Heiman v. Phœnix M. L. Ins. Co., 17 Minn. 153, Gil. 127 (1871); Lightbody v. North Amer. Ins. Co., 23 Wend. (N. Y.) 18 (1840); Idaho, etc., Co. v. Fireman's Fund Ins. Co., 8 Utah 41, 29 Pac. 826 (1892).

[94] New England F. & M. Ins. Co. v. Robinson, 25 Ind. 536 (1865); Whitaker v. Farmers' Un. Ins. Co.,

But a mere delivery of the policy to an agent, to be delivered to the insured upon the payment of the premium, is not a delivery to the insured. In a Massachusetts case it is said:[95] "Previous to the time of receiving the policy he had paid no money and signed no obligation other than the application. It is clear upon this statement that there was no oral contract of insurance and no contract contemplated except upon delivery of the policy and payment of the premium. The agent was the agent of the defendant to receive the premium and deliver the policy for it, and there is no evidence that he had authority to deliver the policy except upon payment of the premium. There was no contract of insurance until the payment of the premium and delivery of the policy."

Delivery is a question of intent and may be shown by any act intended to signify that the instrument shall have present validity.[96]

The rule that a deed can not be delivered conditionally does not apply to an insurance policy. It may be conditionally delivered, and the performance of the condition is a condition precedent to the existence of the contract of insurance.[97] The possession of the policy by the insured makes a *prima facie* case, but this may be overthrown by evidence that it was never actually delivered, or that it was obtained by misrepresentation and fraud.[98]

§ 32. **Countersigning by agent.**—When a policy provides that it shall not be binding until countersigned by a certain agent, it is invalid without such signature.[99]

§ 33. **Contracts made by correspondence.**—Contracts of insurance are frequently made by correspondence, and it is not always easy to

29 Barb. (N. Y.) 312 (1859); Insurance Co. v. Colt, 20 Wall. (U. S.) 560 (1874).

[95] Wainer v. Milford, etc., Ins. Co., 153 Mass. 335 (1891).

[96] Commercial Ins. Co. v. Hallock, 27 N. J. L. 645 (1858).

[97] Harnickell v. New York L. Ins. Co., 111 N. Y. 390 (1888); Benton v. Martin, 52 N. Y. 570 (1873).

[98] Faunce v. State, etc., Assur. Co., 101 Mass. 279 (1869).

[99] Badger v. American, etc., Ins. Co., 103 Mass. 244 (1869); Peoria Ins. Co. v. Walser, 22 Ind. 73 (1864); Hardie v. St. Louis, etc., Ins. Co., 26 La. An. 242 (1874); Noyes v. Phœnix, etc., Ins. Co., 1 Mo. App. 584 (1876); Lynn v. Burgoyne, 13 B. Mon. (Ky.) 400 (1852). *Contra*, Norton v. Phœnix, etc., Ins. Co., 36 Conn. 503, 4 Am. Rep. 98 (1870). In Myers v. Keystone, etc., Ins. Co., 27 Pa. St. 268 (1856), it is said that such a provision in the policy may be dispensed with where the intention is clearly shown.

determine whether a contract has been completed. Such contracts are governed by the following rules:

1. When an offer has been made and a letter of acceptance mailed within a reasonable time, the contract is complete.

2. The recall of an offer sent by mail, in order to be of any effect, must reach the party to whom it is addressed before the acceptance is mailed.

3. An acceptance, in order to complete the contract, must be unconditional and in accordance with the terms of the offer.

4. The acceptance need not be by letter, but may be by any other method sufficient to show a formal determination to accept, communicated or put in a way to be communicated to the party making the offer. A mere mental assent, not communicated, is insufficient, and this is also true of silence or neglect to respond, although the party has done all that is required of him. Changes or modifications made by either party after the terms of the contract are agreed upon must be accepted by the other party. Thus, if an agent agrees with the applicant upon the terms of the insurance, subject to the approval of the principal, and the principal returns the policy with certain modifications, the contract is not consummated until the new terms are accepted by the applicant.[100]

[100] Myers v. Keystone, etc., Ins. Co., 27 Pa. St. 268 (1856). As to contracts by correspondence generally, see Adams v. Lindsell, 1 Barn. & Ald. 681 (1818); Mactier v. Frith, 6 Wend. (N. Y.) 103 (1830); McCulloch v. Eagle Ins. Co., 1 Pick. (Mass.) 278 (1822); Thayer v. Middlesex, etc., Ins. Co., 10 Pick. (Mass.) 326 (1830); article in Western Jurist, May, 1882, p. 339.

PART II.

OF THE SUBJECT-MATTER OF INSURANCE AND THE INTEREST NECESSARY TO SUPPORT THE CONTRACT.

CHAPTER III.

INSURABLE INTEREST IN PROPERTY.

§ 40. **The subject-matter.**—The property or life in which the interest exists is commonly called the subject-matter of the insurance. While this is convenient, it is not strictly accurate, as the real subject of the insurance is the interest, and not the property. The person having the interest in the property is insured against loss to the extent of that interest.

§ 41. **Insurable interest.**—The requirement that a party shall have an interest in the property covered by the policy of insurance rests upon the fundamental principle that contracts of insurance are for indemnity, and not for profit. There can be no indemnity where there is no loss, and no loss where there is no interest. Such insurance can have no other legitimate object than that of protection from loss which may flow directly from damage to the subject-matter. Life insurance is also more or less affected by this principle. The courts have not, in the development of this department of insurance law, been guided by any clearly defined principle. In some cases of recent

date it is argued that life insurance contracts are simply for the indemnification of the beneficiary, who can, therefore, recover only the actual amount of his loss caused by the death of the insured. It is also said that the interest in life which is insurable is simply pecuniary, and that only one who is so situated toward the life that he will suffer a money loss by the death has an insurable interest. Under this rule the amount of the policy must bear some reasonable relation to the value of the interest. By treating the policy as in the nature of a valued policy and holding that it lapses upon the loss of the interest, the contract is rested upon the principle of indemnity. By the weight of authority life insurance contracts are not for indemnity, but merely for the payment of a stipulated sum of money upon the happening of a certain event at an uncertain time in the future. Its modern forms commonly contemplate investment as well as protection, and pass freely by assignment with the consent of the company. Life insurance contemplates protection and often profit, while all other insurance is properly for indemnification only. One purchases indemnity from loss; the other invests in the hope of gain. The law recognizes this difference and sustains insurance upon lives because experience has shown that it is a beneficent contract and that the fears of the early courts and legislators were merely fanciful.

But gambling contracts are invalid without reference to their subject-matter, and a wager in the form of a life insurance contract is no exception to this rule. It was thought at first that human life was too sacred to be made the subject of a contract, but this idea passed, leaving the rule that it could be insured under conditions which were supposed to neutralize the temptation of the beneficiary to destroy the life. This safeguard is found in the rule which requires that the beneficiary of the policy must, at least when the insurance is affected, have such an interest in the continuation of the life as to remove the temptation to hasten the event from which he would receive a financial benefit. Ordinarily the interest is a pecuniary one which is thus set against the financial interest in the death. But the reason of the rule does not require the interest to be of this character, as there are other conditions which experience teaches us are of equal or even greater potency. If the purpose of requiring an interest is to remove the temptation to destroy life, it is apparent that the temptation of a creditor to destroy the life of his insolvent debtor is greater than that of the father to destroy the life of his weak-minded and helplessly crippled child. The prohibition

is against wager or speculative contracts, and when the circumstances are such as to free the contract from this implication it should be sustained, although the interest is not pecuniary. It will be found, however, that there are many decisions to the effect that a valid policy can only be sustained by a pecuniary interest.[1]

§ 42. **Definition.**—Every interest in property or in relation thereto or liability in respect thereof, of such a nature that a contemplated peril may directly damnify the insured, is an insurable interest. In life insurance every person has an insurable interest in the life and health of himself or any person on whom he depends wholly or in part for support or education, or any person under a legal obligation to him for the payment of money, or respecting property or services of which death or illness might delay or prevent the performance, and of any person upon whose life any estate or interest in him depends. "It would seem, therefore," said Mr. Justice Andrews, "that whenever there is a real interest to protect, and a person is so situated with respect to the subject of insurance that its destruction would or might reasonably be expected to impair the value of that interest, an insurance on such interest would not be a wager within the statute, whether the interest was an ownership in or a right to the possession of the property or simply an advantage of a pecuniary character having a legal basis, but dependent upon the continued existence of the subject. It is well-settled that a mere hope or expectation which may be frustrated by the happening of some event is not an insurable interest."[2]

§ 43. **Nature of insurable interest.**—In speaking of the nature of an insurable interest, Mr. Joyce, following the language of Mr. Jus-

[1] See language used in Cronin v. Vermont L. Ins. Co., 20 R. I. 570 (1898); Insurance Co. v. Bailey, 13 Wall. (U. S.) 616 (1871).

[2] Riggs v. Commercial, etc., Ins. Co., 125 N. Y. 7, 25 N. E. 1058 (1890). See also Williams v. Roger Williams Ins. Co., 107 Mass. 377 (1871); Warnock v. Davis, 104 U. S. 775 (1881); Loomis v. Eagle, etc., Ins. Co., 6 Gray (Mass.) 396 (1856); Trinity College v. Travelers' Ins. Co., 113 N. C. 244 (1893); Lucena v. Crauford, 3 Bos. & P. 75 (1802); Wainer v. Milford M. F. Ins. Co., 153 Mass. 335, 11 L. R. A. 598 (1890). A person need not hold the title if he is so situated that he would suffer loss or damage by the destruction of the property: Home Ins. Co. v. Mendenhall, 164 Ill. 458, 36 L. R. A. 374 (1897).

tice Story, says:[3] "An insurable interest is *sui generis,* and peculiar in its texture and operation. It sometimes exists where there is no present property or *jus in re* or *jus ad rem.* It may cover inchoate rights or rights in expectation, such as profits or commissions. Again, a person may be so circumstanced that it may be important that a thing should have a continued existence; or he may be so related to or concerned in the same that he would almost positively derive a certain benefit or advantage therefrom, but for its exposure to risks and dangers, in which case he is interested in its safety or situation."

§ 44. **Different interests.**—As there may be various distinct interests in a subject-matter, it follows that different parties may have distinct insurable interests in the same property.[4]

§ 45. **Time of interest.**—It was formerly held that the interest necessary to support an insurance on property must exist at the time the contract is made and at the time of the loss.[5] It is probable that the greater number of cases announce this doctrine,[6] although there is a decided tendency toward applying the same rule to fire insurance that has always been held to apply to marine and life insurance.[7] It

[3] Joyce Ins., § 888.

[4] Strong v. Manufacturers' Ins. Co., 10 Pick. (Mass.) 40 (1830); Columbian Ins. Co. v. Lawrence, 2 Pet. (U. S.) 25 (1829); Herkimer v. Rice, 27 N. Y. 163 (1863).

[5] Lynch v. Dalzel, 3 Brown Parl. Cas. 497 (1729); Sadler Co. v. Badcock, 2 Atk. 554 (1743); Fowler v. New York, etc., Ins. Co., 26 N. Y. 422 (1863); Hancox v. Fishing Ins. Co., 3 Sumn. (C. C.) 132, 142 (1837), Story, J. *Contra,* Chrisman v. State Ins. Co., 16 Ore. 283, 288, 18 Pac. 466 (1888); Home Ins. Co. v. Mendenhall, 164 Ill. 458, 36 L. R. A. 374 (1897); Dickerman v. Vermont, etc., Ins. Co., 67 Vt. 99, 30 Atl. 808 (1894). The authorities on both sides are collected in a note to 52 L. R. A. 330.

[6] This is the rule in Massachusetts: Clinton v. Norfolk Mut. F. Ins. Co., 176 Mass. 486, 57 N. E. 998, 79 Am. St. 325 (1900).

[7] In Sun Ins. Office v. Merz, 64 N. J. L. 301, 52 L. R. A. 330 (1900), the court said, with reference to the claim that the insurable interest must exist at the time the contract is made: "This was formerly considered to be the rule with relation to fire policies, and was so declared both by text-writers and in decided cases, although a contrary view was always taken in construing life and marine policies. Why any such variance in construction existed it is difficult to understand; for certainly if a contract to insure after-acquired property against fire is a wagering contract, and therefore void because against public policy, a contract to insure such property against marine risks, or a contract to insure the life of a person in fa-

does not appear that there ever was any reason for the distinction. It certainly is sufficient if the insured has an interest under any *status* of ownership at the time the contract is made unless inquiry is made for the specific interest.[8] With reference to the rule in marine insurance, a learned writer, who is quoted with approval by the supreme court of the United States, says:[9] "It is now clearly established that an insurable interest subsisting during the risk and at the time of the loss is sufficient, and that the assured need not also allege or prove that he was interested at the time the contract was effected; indeed, it is an every day's practice to effect insurance in which the allegation can not be made with any degree of truth: as, for instance, where goods are insured on a return voyage long before they are bought." A fire insurance policy may cover goods purchased after a policy has gone into effect.[10] So, crops not yet grown may be legally insured.[11]

§ 46. **Continuity of interest.**—It follows from what has been said in the preceding section that the interest need not be continuous. In those jurisdictions which hold that the interest need not exist at the time the policy is taken out, it is sufficient if it exists at some time

vor of one who at the time of the taking out of the policy has no interest therein, are equally wagering contracts, and if such contracts are prohibited by public policy, should equally be considered void. But, although the earlier cases on fire insurance laid down the rule enunciated by the supreme court, experience has taught that the necessities of business and the adequate protection of property require the same methods of insurance against fire as have always existed with relation to losses by the perils of the sea. And reflection has led to the conclusion that contracts of insurance upon property in which the insured has no interest at the time of the issue of the policy are not wagers if he acquires an interest during the life of the policy and retains it at the time when the loss occurs."

[8] Insurance Co. v. Haven, 95 U. S. 242 (1877).

[9] 1 Arnould Mar. Ins. (Maclachlan's ed.) 59; quoted in Hooper v. Robinson, 98 U. S. 528 (1878). See also, Boston Ins. Co. v. Globe Fire Ins. Co., 174 Mass. 229, 75 Am. St. 303 (1899); Lucena v. Craufurd, 2 Bos. & P. N. R. 295, 6 Rev. Rep. 623 (1802).

[10] West Branch Ins. Co. v. Helfenstein, 40 Pa. St. 289, 80 Am. Dec. 573 (1861); Western, etc., Pipe Lines v. Home Ins. Co., 145 Pa. St. 346 (1891); Nutts v. Farmers' Ins. Co., 37 Iowa 400 (1873). Policy held to cover a horse acquired in exchange for the one owned when it was taken out: See Wood v. Rutland, etc., Ins. Co., 31 Vt. 552 (1859), and note to Strong v. Manufacturers' Ins. Co., 20 Am. Dec. 518.

[11] Grant v. Parkinson, 3 Bos. & P. 85n.

during the risk and at the time of the loss. But policies now generally contain a provision forbidding a change of title or the alienation of the property under a penalty of forfeiture. This provision is effective,[12] but in its absence the contract is merely suspended during the time the interest is gone, and revives to secure the new interest acquired before the loss.[13]

A condition against alienation is strictly construed and refers only to an entire and absolute divestiture of interest.[14] If, at the time of the loss, a partial interest remains, recovery may be had to that extent.[15] Thus, where the insured incumbered personal property contrary to the provisions of the policy, it was held that he was nevertheless entitled to recover if the lien had been removed before the time of the loss.[16] A life policy originally valid is generally held not to be invalidated by loss of interest.[17]

§ 47. **Nature of interest.**—The interest which may be insured must be neither illegal nor immoral.[18] It may be either legal or equitable,[19] but it is not necessary that the party should have either a

[12] § 265, *infra;* Home Mut. F. Ins. Co. v. Hauslein, 60 Ill. 521 (1871).

[13] Worthington v. Bearse, 12 Allen (Mass.) 382 (1866); Clinton v. Norfolk Mut. F. Ins. Co., 176 Mass. 486, 79 Am. St. 325 (1900).

[14] Clinton v. Norfolk Mut. F. Ins. Co., 176 Mass. 486, 79 Am. St. 325 (1900); Jackson v. Massachusetts, etc., Ins. Co., 23 Pick. (Mass.) 418 (1839); Power v. Ocean Ins. Co., 19 La. 28, 36 Am. Dec. 665 (1841); Dolliver v. St. Joseph, etc., Ins. Co., 9 Ins. L. J. 293, and note on "alienation."

[15] Cowan v. Iowa, etc., Ins. Co., 40 Iowa 551 (1875); Ætna F. Ins. Co. v. Tyler, 16 Wend. (N. Y.) 385 (1836). See monographic note to Lane v. Maine, etc., Ins. Co., 28 Am. Dec. 155, and Ayres v. Hartford F. Ins. Co., 17 Iowa 176, 85 Am. Dec. 553.

[16] Omaha F. Ins. Co. v. Dierks, 43 Neb. 569, 61 N. W. 745 (1895). But see Imperial F. Ins. Co. v. Coos County, 151 U. S. 452 (1893); § 262, *infra.*

[17] Connecticut, etc., Ins. Co. v. Schaefer, 94 U. S. 457 (1876). In this case Mr. Justice Bradley said: "In a lucid judgment delivered by Baron Parke in the exchequer chamber, in the case of Dalby v. India, etc., Assur. Co., decided in 1854, 15 C. B. 365, it was held that the true meaning of the statute is, that there must be an interest at the time that the insurance is effected, but that it need not continue until death."

[18] Lord v. Dall, 12 Mass. 115 (1815); Carrigan v. Lycoming F. Ins. Co., 53 Vt. 418 (1881). An insurance of liquors kept for illegal sale is invalid; but where the insured was a druggist, and only a small portion of the property was liquor, and nothing of illegality appeared in the contract, which was collateral to the occasional acts of illegal selling, the policy was held valid. See § 14, *supra.*

[19] The holder of such interest may describe himself as owner: Guest v. New Hampshire F. Ins. Co., 66

legal or equitable title to the property.[20] The interest may be either conditional or contingent. Thus, Arnould says:[21] "A vested interest in possession is not necessary to give the right of insuring. An expectancy coupled with a present existing title to that out of which the expectancy arises is an insurable interest." Judge Story says:[22] "Inchoate rights founded upon titles subsisting at the time of loss, unless prohibited by the policy of the law, are insurable." An interest under a contract which is not enforcible either at law or equity is not insurable.[23] An insurable interest does not imply ownership of the property or even a right to its possession.[24] A person may insure his interest in expected commissions,[25] or, in what seems an extreme case, an expected catch of fish.[26] But in all such cases an expectation of profit or benefit must arise out of some subject in which the party is actually interested at the time of the loss, and it is not enough that he only expects to be interested in such property.[27] A person who is liable to others for the loss or destruction of property in which he has no actual interest may have an insurable interest therein. Thus, common carriers, warehousemen, pawnbrokers and such persons have an insurable interest in the property for which they

Mich. 98 (1887); Elliott v. Ashland, etc., Ins. Co., 117 Pa. St. 548 (1888).

[20] Rohrbach v. Germania, etc., Ins. Co., 62 N. Y. 47 (1875); National, etc., Co. v. Citizens' Ins. Co., 106 N. Y. 535, 541 (1887); Carter v. Humboldt F. Ins. Co., 12 Iowa 287 (1861).

[21] 1 Arnould Mar. Ins. 58.

[22] Hancox v. Fishing Ins. Co., 3 Sumn. (C. C.) 132 (1837).

[23] Perry v. Mechanics' Mut. Ins. Co., 11 Fed. 478 (1879); Redfield v. Holland Purchase Ins. Co., 56 N. Y. 354 (1874).

[24] One who has neither the legal nor equitable title, nor the right of possession of property, has an insurable interest if he will derive a benefit from its continuing to exist, or suffer a loss by its destruction: Hanover, etc., Ins. Co. v. Bohn, 48 Neb. 743, 58 Am. St. 719 (1896). See note to Rochester, etc., Co. v. Liberty Ins. Co., 44 Neb. 537, 48 Am. St. 753 (1895).

[25] Putnam v. Mercantile Mar. Ins. Co., 5 Metc. (Mass.) 386, 392 (1843).

[26] Swift v. Mercantile Mut. Ins. Co., 113 Mass. 287 (1873).

[27] See Hayes v. Milford M. F. Ins. Co., 170 Mass. 492, 49 N. E. 754 (1898); Warren v. Davenport F. Ins. Co., 31 Iowa 464 (1871); Rohrbach v. Germania, etc., Ins. Co., 62 N. Y. 47. In Eastern R. Co. v. Relief Fire Ins. Co., 98 Mass. 420 (1868), Mr. Justice Gray said: "By the law of insurance any person has an insurable interest in property by the existence of which he receives a benefit or by the destruction of which he will suffer a loss, whether he has or has not any title in or lien upon, or possession of the property itself."

are made responsible by statute or custom.[28] So, a railroad company which is liable by law for injury to property along its line, caused by fire from its engines, has an insurable interest in such property.[29] The fact that the interest may possibly be defeated does not prevent it from being insurable.[30]

§ 48. **Illustrations.**—The following cases selected from the innumerable number found in the books will illustrate the interest which the law recognizes as insurable:—A vendee of land in possession under an executory contract of purchase, who is entitled to a deed upon payment of the purchase-money;[31] one who is in possession under a parol contract and who has paid part of the purchase-money;[32] the owner of an interest in a vessel acquired under an oral contract of purchase;[33] a person holding possession under a contract to purchase from the equitable owner;[34] a vendor who has contracted to convey;[35] a purchaser at an execution sale;[36] a person in possession of real estate under a *bona fide* claim of right to the ownership of the same;[37] one in possession of the property of another, to whom he has advanced part of the purchase-money, and

[28] Phœnix Ins. Co. v. Erie, etc., Trans. Co., 117 U. S. 312 (1885).

[29] Eastern R. Co. v. Relief F. Ins. Co., 105 Mass. 570 (1870); Perley v. Eastern R. Co., 98 Mass. 414 (1868); Chapman v. Atlantic, etc., R. Co., 37 Me. 92 (1854).

[30] Stirling v. Vaughan, 11 East 619, 629 (1809).

[31] Loventhal v. Home Ins. Co., 112 Ala. 108, 57 Am. St. 17 (1895); Imperial F. Ins. Co. v. Dunham, 117 Pa. St. 460 (1888); Grange Mill Co. v. Western Assur. Co., 118 Ill. 396 (1886); Dupreau v. Hibernia Ins. Co., 76 Mich. 615, 5 L. R. A. 671 (1889); Davidson v. Hawkeye Ins. Co., 71 Iowa 532, 60 Am. Rep. 818 (1887); Smith v. Phœnix Ins. Co., 91 Cal. 323, 25 Am. St. 191 (1891); Hartford F. Ins. Co. v. Keating, 86 Md. 130, 63 Am. St. 499 (1897). These cases consider what is meant by an "unconditional and sole" title. One in possession claiming under a deed: Sanford v. Orient Ins. Co., 174 Mass. 416, 75 Am. St. 358 (1899).

[32] Wainer v. Milford M. F. Ins. Co., 153 Mass. 335, 11 L. R. A. 598 (1890); Tuckerman v. Home Ins. Co., 9 R. I. 414 (1870). In Gilman v. Dwelling-House Ins. Co., 81 Me. 488 (1889), the conditions of the contract had been broken, but no advantage had been taken of it.

[33] Amsinck v. American Ins. Co., 129 Mass. 185 (1880).

[34] Carpenter v. German Amer. Ins. Co., 135 N. Y. 298, 31 N. E. 1015 (1892).

[35] Wheeling, etc., Ins. Co. v. Morrison, 11 Leigh (Va.) 354, 36 Am. Dec. 385 (1840).

[36] Curtis v. Home Ins. Co., 1 Biss. (C. C.) 485 (1865).

[37] Miller v. Alliance Ins. Co., 7 Fed. 649 (1881).

from whom he holds a power of attorney to sell the property;[38] one in possession of property under an agreement to care for, rent and keep insured;[39] contractors and builders in buildings in process of construction, for which they are to receive payment upon completion;[40] the owner of land, in buildings in the process of construction upon the land;[41] one who has expended money upon another's property with the owner's consent;[42] lien creditors in the property to which the lien attaches;[43] the holder of a mechanic's lien;[44] the mortgagor and the mortgagee in the property mortgaged;[45] a mort-

[38] Brugger v. State Inv. Ins. Co., 5 Saw. (C. C.) 304 (1878).

[39] Cross v. National F. Ins. Co., 132 N. Y. 133, 30 N. E. 390 (1892). See Graham v. Ins. Co., 48 S. C. 195, 59 Am. St. 707 (1896). A party in possession, under an agreement with the owner to pay for the insurance, may, as agent, insure for the owner's benefit: Schaeffer v. Anchor, etc., Ins. Co. (Iowa), 85 N. W. 985 (1901).

[40] German Fire Ins. Co. v. Thompson, 43 Kan. 567, 23 Pac. 608 (1890).

[41] In Foley v. Manufacturers' & B. F. Ins. Co., 152 N. Y. 131, 43 L. R. A. 665 (1897), it was held that the owner had an insurable interest to the extent of the value of a building being erected upon his land, under a contract requiring it to be completed within a certain time, not yet expired, although the loss, in the absence of insurance, would fall on the contractor. "The fact that the improvements on the land may have cost the owner nothing, or that if destroyed by fire he may compel another to replace them, or that he may recoup his loss by resort to a contract liability of a third person, in no way affects the liability of the insurer, in the absence of an exemption in the policy." In Santa Clara, etc., Academy v. Northwestern, etc., Ins. Co., 98 Wis. 257, 67 Am. St. 805 (1898), the court said: "It is well settled that, in the absence of fraud or mistake, unless otherwise provided in the contract of insurance, if the insured has some insurable interest in the property covered by such contract, the whole amount of damages to the property, not exceeding that named in the policy, is recoverable by such person if the damages thereto reach that sum, or if, by the contract itself and the law governing the subject, the face value of the policy must be taken as liquidated damages."

[42] Looney v. Looney, 116 Mass. 283 (1874).

[43] Ins. Co. v. Stinson, 103 U. S. 25 (1880); Bell v. Western, etc., Ins. Co., 5 Rob. (La.) 423, 39 Am. Dec. 542 (1843); Longhurst v. Star Ins. Co., 19 Iowa 364 (1865).

[44] Stout v. City F. Ins. Co., 12 Iowa 371, 79 Am. Dec. 539 (1861).

[45] Carpenter v. Providence, etc., Ins. Co., 16 Pet. (U. S.) 495 (1842); Manson v. Phœnix Ins. Co., 64 Wis. 26 (1885); Traders' Ins. Co. v. Robert, 9 Wend. (N. Y.) 405 (1832); King v. State, etc., Ins. Co., 7 Cush. (Mass.) 1, 54 Am. Dec. 683 (1851); Hanover, etc., Ins. Co. v. Bohn, 48 Neb. 743, 58 Am. St. 719 (1896).

gagor, although the mortgage debt is the full value of the property;[46] a mortgagor of personal property;[47] a husband in the community property;[48] an administrator in the property of the estate;[49] commission merchants in property sold, but not removed;[50] a common carrier in goods in his care;[51] a warehouseman in goods stored with him;[52] a cotton compress company in cotton received to press;[53] agents, commission merchants and others having the custody of and responsibility for property;[54] the trustee and the *cestui que trust* in the trust property;[55] the assignee in insolvency in the assigned property;[56] the surety on a distiller's bond required by the revenue law, in whisky in store;[57] a partner in the entire property of the

[46] Owner of equity of redemption: Ins. Co. v. Stinson, 103 U. S. 25 (1880).

[47] Kronk v. Birmingham F. Ins. Co., 91 Pa. St. 300. As to the amount for which a mortgagee or mortgagor may insure, see Guest v. New Hampshire F. Ins. Co., 66 Mich. 98 (1887); French v. Rogers, 16 N. H. 177 (1844); Smith v. Columbia Ins. Co., 17 Pa. St. 253, 55 Am. Dec. 546 (1851); Excelsior F. Ins. Co. v. Royal Ins. Co., 55 N. Y. 343 (1873). Each of several mortgagees has an insurable interest to the extent of his interest: Fox v. Phenix F. Ins. Co., 52 Me. 333 (1864). Where the destruction of the property would leave the debt unpaid, the debtor in possession of the pledged property has an insurable interest to the extent of the value of the property which would have gone to pay the debt: Nussbaum v. Northern Assur. Co., 37 Fed. 524, 1 L. R. A. 706 (1889).

[48] Hanover Fire Ins. Co. v. Shrader, 11 Tex. Civ. App. 255, 31 S. W. 1100 (1895).

[49] Sheppard v. Peabody Ins. Co., 21 W. Va. 368 (1883).

[50] One may in his own name insure the property of another for the benefit of the owner without his previous authority or sanction, and it will inure to the benefit of the owner upon the subsequent adoption of it, even after a loss has occurred: Waring v. Indemnity F. Ins. Co., 45 N. Y. 606 (1871).

[51] Phœnix Ins. Co. v. Erie, etc., Trans. Co., 117 U. S. 312 (1885).

[52] Pelzer Mfg. Co. v. St. Paul, etc., Ins. Co., 41 Fed. 271 (1890); Pelzer Mfg. Co. v. Sun Fire Office, 36 S. C. 213, 15 S. E. 562 (1891).

[53] California Ins. Co. v. Union Compress Co., 133 U. S. 387 (1890).

[54] Waring v. Indemnity Ins. Co., 45 N. Y. 606 (1871); Western, etc., Pipe Lines v. Home Ins. Co., 145 Pa. St. 346, 27 Am. St. 703 (1891); Roberts v. Firemen's Ins. Co., 165 Pa. St. 55, 44 Am. St. 642 (1894).

[55] Ex parte Houghton, 17 Ves. Jr. 251 (1809); Carpenter v. Providence, etc., Ins. Co., 16 Pet. (U. S.) 495 (1842); Hartford F. Ins. Co. v. Keating, 86 Md. 130, 63 Am. St. 499 (1897); Young v. Union Ins. Co., 24 Fed. 279 (1885).

[56] Herkimer v. Rice, 27 N. Y. 163 (1863).

[57] Ins. Cos. v. Thompson, 95 U. S. 547 (1877).

firm;[58] a creditor in goods which he has sold under a contract by which he is to receive his pay out of the proceeds of the goods when sold by the vendee;[59] a simple contract creditor in the specific property in the estate of the deceased debtor where the estate may be subjected to a proceeding *in rem* for the payment of the debts and is insufficient for that purpose;[60] an attaching creditor in the property attached or levied upon under an execution, but such creditor must insure his own interest, and can not avail himself of the debtor's insurance;[61] a judgment creditor upon the property of the debtor upon which his judgment is a lien,[62] but a general judgment creditor, under ordinary circumstances, has no insurable interest in the specific property of his debtor;[63] the owner in goods concealed from his creditor;[64] the owner in goods which have been levied upon by his creditor and sold under execution, so long as the right to redeem remains;[65] an insolvent debtor in goods which have passed to the assignee;[66] a lessor in leased property;[67] a lessee in property leased;[68] a landlord in the goods of his tenant which are liable to distress;[69] an officer in goods held by him under an attachment or levy;[70] a life tenant in the property in his possession;[71] a remainder-man in the property in the possession of the life tenant;[72]

[58] Manhattan Ins. Co. v. Webster, 59 Pa. St. 227 (1868).

[59] Roos v. Merchants' Mut. Ins. Co., 27 La. An. 409 (1875).

[60] Creed v. Sun Fire Office, 101 Ala. 522, 23 L. R. A. 177 (1893).

[61] Donnell v. Donnell, 86 Me. 518, 30 Atl. 67 (1894).

[62] Rohrbach v. Germania, etc., Ins. Co., 62 N. Y. 47 (1875).

[63] Grevemeyer v. Southern, etc., Ins. Co., 62 Pa. St. 340, 1 Am. Rep. 420 (1869).

[64] Goulstone v. Royal Ins. Co., 1 Fost. & F. 276 (1858).

[65] Cone v. Niagara F. Ins. Co., 60 N. Y. 619 (1875).

[66] Marks v. Hamilton, 16 Jur. 152 (1852).

[67] Philadelphia Tool Co. v. British-Amer. Assur. Co., 132 Pa. St. 236 (1890); Sherwood v. Harral, 39 Conn. 338 (1872).

[68] Imperial F. Ins. Co. v. Murray, 73 Pa. St. 13 (1873). As to the amount of the interest of the lessee, see Home Ins. Co. v. Gibson, 72 Miss. 58, 17 So. [illegible] (1894). A tenant who has verbally agreed to keep the property insured has an insurable interest: Berry v. American, etc., Ins. Co., 132 N. Y. 49, 28 Am. St. 548, and note, (1892).

[69] Columbia Ins. Co. v. Cooper, 50 Pa. St. 331 (1865).

[70] White v. Madison, 26 N. Y. 117 (1862). The officer can not effect insurance on property held by him at the expense of the parties: Burke v. Brig M. P. Rich, 1 Cliff. (C. C.) 509 (1860).

[71] See Cross v. National F. Ins. Co., 132 N. Y. 133, 30 N. E. 390 (1892).

[72] Redfield v. Holland Purchase Ins. Co., 56 N. Y. 354, 15 Am. Dec. 424 (1874).

a tenant in common in the property;[73] a husband in the property in which he is a tenant by curtesy;[74] a husband in the buildings on land purchased and paid for by him but conveyed to his wife, where he has in fact possession and the beneficial use of the premises.[75] By the weight of authority a stockholder in a private corporation has an insurable interest in the corporate property.[76]

[73] Annely v. De Saussure, 26 S. C. 97 (1886).

[74] Abbott v. Hampden, etc., Ins. Co., 30 Me. 414 (1849).

[75] Horsch v. Dwelling-House Ins. Co., 77 Wis. 4, 8 L. R. A. 806 (1890).

[76] Riggs v. Commercial, etc., Ins. Co., 125 N. Y. 7, 25 N. E. 1058, 10 L. R. A. 684 (1890); Warren v. Davenport F. Ins. Co., 31 Ia. 464, 7 Am. Rep. 160 (1871); Seaman v. Enterprise, etc., Ins. Co., 18 Fed. 250 (1883). *Contra*, Dictum in Philips v. Knox County Mut. Ins. Co., 20 Ohio 174 (1851).

CHAPTER IV.

INSURABLE INTEREST IN LIVES.

§ 55. **The rule at common law.**—At common law a contract of life insurance was admittedly a wager, and hence required no interest to support it, but the statute 14 Geo. III, chap. 48, made an interest in the life essential. Some courts have held that this statute was merely declaratory of the common law, but the better opinion is otherwise, and it is certain that many such contracts were held valid before the statute was enacted.[1] Baron Parke says:[2] "As to insurance upon lives, it is perfectly clear that all contracts for wager policies, and wagers which were not contrary to the policy of the law, were legal contracts." In some of the early cases in this country it was said that life insurance contracts do not require an insurable interest in the absence of a statute such as had been enacted in England. In an early case in Missouri it was held that no interest was required;[3]

[1] Emerigon Ins. 159; Assievedo v. Cambridge, 10 Mod. 77 (1710); Depaba v. Ludlow, 1 Comyn 361 (1721); Dean v. Dicker, 2 Strange 1250 (1746).

[2] Dalby v. India, etc., Assur. Co., 15 C. B. 365 (1854).

[3] Chisholm v. National, etc., Ins. Co., 52 Mo. 213, 14 Am. Rep. 414 (1873); but see Whitmore v. Supreme Lodge, 100 Mo. 36 (1889); Trenton, etc., Ins. Co. v. Johnson, 24 N. J. L. 577 (1854). At least the interest need only exist

and the courts of New Jersey and Rhode Island are notably liberal in sustaining life insurance policies, although in Rhode Island some insurable interest is required.[4] Thus, in that state it was recently said: "A policy on another's life is just as dangerous and tempting to crime where there is an interest as where there is not." But the rule was early settled, as stated by Chancellor Kent, that "a wager contract is void if it be against the principles of public policy equally as if it contravened a positive law."[5] So, in an early Pennsylvania case,[6] it was said that "a policy made without interest is a wager policy, and has nothing in common with insurance but name and form. It is not subservient to the true interest of fair trade and commerce, but is pregnant with as much mischief, both public and private, as can proceed from any species of gaming, which the legislature has hitherto found it necessary to suppress."

§ 56. The English statute—Not in force in this country.—In a recent case in Wisconsin, the court, after stating the rule that an interest in life is required, said[7] that the theory upon which the decisions are based is that such a contract is nothing more than a wagering or gambling contract, and hence is against public policy, and therefore void. It is very questionable whether such a policy was void by the common law of England prior to 1774. In the year named, the statute of 14 Geo. III, chap. 48, was enacted, which is to the effect that thereafter "no insurance shall be made by any person or persons, bodies politic or corporate, on the life or lives of any person or persons, or on any other event whatsoever, wherein the person or persons for whose use, benefit, or on whose account such policy or policies

when the policy is taken out: Mowry v. Home L. Ins. Co., 9 R. I. 346 (1869).

[4] See Cronin v. Vermont L. Ins. Co., 20 R. I. 570 (1898).

[5] See the following early cases: Amory v. Gilman, 2 Mass. 1 (1806) [marine case discussing wager policies]; Mount v. Waite, 7 John. (N. Y.) 434 (1811) [insurance on lottery tickets. The contract was held void as against public policy; but as the plaintiff had not violated any statute, and was hence not *in pari delicto*, Chancellor Kent allowed him to recover the premiums paid]; Lord v. Dall, 12 Mass. 115, 7 Am. Dec. 38 (1815) [sister in the life of brother. This is the first American life insurance case]; Ruse v. Mutual Ben. L. Ins. Co., 23 N. Y. 516 (1861).

[6] Pritchet v. Ins. Co., 3 Yeates (Pa.) 458 (1803).

[7] Hurd v. Doty, 86 Wis. 1, 56 N. W. 371, 21 L. R. A. 746 (1893). As to what is a wagering policy, see Metropolitan L. Ins. Co. v. O'Brien, 92 Mich. 584, 52 N. W. 1012 (1892).

shall be made, shall have no interest, or by way of gambling or wagering, and that every assurance made contrary to the true intent and meaning hereof shall be null and void, to all intents and purposes whatsoever." The court further said that this statute was never in force in Wisconsin and was never received and acted upon in this country.

§ **57. The modern rule.**—It is now the settled rule that an interest in the continuance of the life of the insured is necessary to support a contract of life insurance.[8] The only difficulty is in defining this interest. As said by Mr. Justice Field:[9] "It is not easy to define with precision what will in all cases constitute an insurable interest so as to take the contract out of the class of wager policies. It may be stated generally, however, to be such an interest, arising from the relations of the party obtaining the insurance, either as creditor of or surety for the assured, or from the ties of blood or marriage to him, as will justify a reasonable expectation of advantage or benefit from the continuance of his life. It is not necessary that the expectation of advantage or benefit should be always capable of pecuniary estimation, for a parent has an insurable interest in the life of his child, and a child in the life of his parent, a husband in the life of his wife, and a wife in the life of her husband. The natural affection in cases of this kind is considered more powerful—as operating more efficaciously—to protect the life of the insured than any other consideration. But in all cases there must be a reasonable ground, founded upon the relations of the parties to each other, either pecuniary or of blood or affinity, to expect some benefit or advantage from the continuance of the life of the assured. Otherwise, the contract is a mere wager, by which the party taking the policy is directly interested in the early death of the assured. Such policies have a tendency to create a desire for the event. They are, therefore, independently of any statute on the subject, condemned, as being against public policy."

[8] Holmes v. Gilman, 138 N. Y. 369, 34 Am. St. 463, and notes (1893); Crotty v. Union, etc., Ins. Co., 144 U. S. 621 (1892); Ulrich v. Reinoehl, 143 Pa. St. 238, 22 Atl. 862 (1896) [involving the question to what extent creditor may insure life of his debtor]; Whitmore v. Supreme Lodge, 100 Mo. 36, 13 S. W. 495 (1889); Amick v. Butler, 111 Ind. 578 (1887); Trinity College v. Travelers' Ins. Co., 113 N. C. 244 (1893). See note to 57 Am. Dec. 93–105.

[9] Warnock v. Davis, 104 U. S. 775 (1881).

§ 58. The amount of a creditor's insurable interest.—In all cases the interest must be of such a nature as to take the contract out of the class of wagers. Hence, the amount of the insurance, where the interest is of a pecuniary nature, must bear some proper relation to the value of the interest.[10] If the amount which a creditor takes upon the life of his debtor is grossly disproportionate as compared with the debt, the contract will be treated as a wager, and, therefore, void.[11] In the jurisdictions which permit the assignment of a valid existing policy to a person without interest, the assignee may recover the entire amount of the policy.[12] But in a comparatively recent case in Pennsylvania[13] the court laid down the rule for determining the amount of a creditor's insurable interest as follows: "A creditor may lawfully take out a policy of insurance on the life of his debtor in an amount sufficient to cover the debt, with interest on the cost of such insurance, with interest thereon during the period of the debtor's expectancy of life according to the Carlisle tables. If such amount be exceeded the policy may be a wagering transaction."

Where the policy is taken out by the debtor or assigned as security for his creditor, the former paying the premium, the personal rep-

[10] Grant v. Kline, 115 Pa. St. 618, 9 Atl. 150 (1887) ["creditors, however, hold only what is necessary for their indemnity for the debt, and the representatives of the insured will be entitled to the balance"]; Metropolitan L. Ins. Co. v. O'Brien, 92 Mich. 584 (1892); Page v. Burnstine, 102 U. S. 664 (1880); Downey v. Hoffer, 110 Pa. St. 109, 20 Atl. 655 (1885). See note on "Insurable Interest in the Life of Another," 57 Am. Dec. 93–105. A moral claim does not constitute an insurable interest on behalf of one as a creditor: Guardian, etc., Ins. Co. v. Hogan, 80 Ill. 35, 22 Am. Rep. 180 (1875).

[11] In Cammock v. Lewis, 15 Wall. (U. S.) 643 (1872), a policy for $3,000 was taken out to secure a debt of $70 owed by L to C. The latter paid the premiums for one year. L then gave C his note for $3,000 without consideration, with an agreement back that in case of the death of L, C would pay L's widow one-third of the policy. It was held that C could retain only the amount of his debt with such sums as he had advanced. See Givens v. Veeder, 9 N. Mex. 256 (1897).

[12] See Wright v. Mutual, etc., Ass'n, 118 N. Y. 237, 16 Am. St. 749 (1890).

[13] Ulrich v. Reinoehl, 143 Pa. St. 238, 24 Am. St. 534, 22 Atl. 862 (1891); Wheeland v. Atwood, 192 Pa. St. 237, 73 Am. St. 803 (1899). See also Hays v. Lapeyre, 48 La. An. 749, 35 L. R. A. 647 (1895); Exchange Bank v. Loh, 104 Ga. 446, 44 L. R. A. 372 (1898); Fisher v. Donovan, 57 Neb. 361, 44 L. R. A. 383 (1899); Roberts v. Winton, 100 Tenn. 484, 41 L. R. A. 275 (1898); Carson v. Vicksburg Bank, 75 Miss. 167, 37 L. R. A. 559 (1897).

resentatives of the insured are entitled to the balance after the creditor's debt is paid.[14]

§ 59. **Mere form disregarded.**—The courts will not permit the mere form of a policy to cover and protect a wager contract.[15] Thus, where the contract recited that the insured had himself paid the first premium, the insurer was allowed to show that the premium was in fact paid by the beneficiary, who had no insurable interest.[16] So where it appeared that the person insured was only a nominal party to the contract, and that the beneficiary named in the policy had in reality procured the insurance and paid the premiums, it was held that, "in order that the transaction may be taken out of the category of wager contracts, the beneficiary must have had an insurable interest of a pecuniary character, or of that nature, either present or prospective, at the time the policy had its inception."[17] The essential thing is that the policy shall be obtained in good faith, and not for the purpose of speculating upon the hazard of a life in which the insurer has no interest.[18]

The manner of the payment of the premium is of much importance in determining whether the policy is speculative, and the tendency is to condemn contracts where the premium is paid by the beneficiary who has no insurable interest, although the policy was taken out by the insured. Thus, a policy was held invalid, although the insured himself made the application, where it appeared that the beneficiary paid the premiums.[19]

[14] Morris v. Georgia Loan, etc., Ass'n, 109 Ga. 12, 46 L. R. A. 506 (1899), and note; Amick v. Butler, 111 Ind. 578 (1887). See Hale v. Life Indem., etc., Co., 65 Minn. 548 (1897). In Rittler v. Smith, 70 Md. 261, 2 L. R. A. 844 (1889), it was held that a creditor could insure the life of his debtor and collect the amount, although his debt had been paid before the death of the debtor; but the relation between the debt and the policy must not be grossly disproportionate. As to who are legal representatives within the meaning of a life insurance policy, see note to Rose v. Wortham, 95 Tenn. 505, 30 L. R. A. 609.

[15] Guardian, etc., Ins. Co. v. Hogan, 80 Ill. 35, 22 Am. Rep. 180 (1875); Whitmore v. Supreme Lodge, 100 Mo. 36 (1889).

[16] United Brethren, etc., Soc. v. McDonald, 122 Pa. St. 324, 1 L. R. A. 238 (1888).

[17] Amick v. Butler, 111 Ind. 578, 60 Am. Rep. 722 (1887).

[18] Connecticut M. L. Ins. Co. v. Schaefer, 94 U. S. 457 (1876).

[19] Trinity College v. Travelers' Ins. Co., 113 N. C. 244, 22 L. R. A. 291 (1893). See Burton v. Connecticut M. L. Ins. Co., 119 Ind. 207 (1889); Rawls v. American M. L. Ins. Co., 27 N. Y. 282, 84 Am. Dec. 280 (1863); Burke v. Prudential Ins. Co., 155 Pa. St. 295 (1893).

§ 60. Continuance of interest in life.—We have found that life insurance is not a contract of indemnity and that the requirement of interest is necessary merely to prevent condemnation by the statute or common-law rule against wager contracts. In fire and marine insurance contracts the insured is indemnified for the loss of interest existing at the time of the loss. But in life insurance it is only necessary that an interest exist at the time the contract is made. It seems to be the prevailing rule that if the contract is originally valid it is not affected by the loss of interest unless such is the necessary result of the provisions of the policy.[20] Thus, where a married woman is named as the beneficiary in an ordinary policy of insurance on the life of her husband, the policy remains in force although she obtains a divorce before his death.[21] But where the insurance is in a mutual benefit association, the relation of husband and wife must, by the ordinary terms of the contract, exist at the time of the death.[22] There is, however, a line of cases which holds that the assignee of a life insurance policy must have an insurable interest notwithstanding the fact that it was valid when issued.[23] It is said by the supreme court of the United States that "if the policy of insurance be taken out by a debtor on his own life, naming a creditor as beneficiary, or with a subsequent assignment to a creditor, the general doctrine is that on payment of the debt the creditor loses all interest therein, and the policy becomes one for the benefit of the insured and collectible by his executors or administrators."[24]

[20] Ins. Co. v. Bailey, 13 Wall. (U. S.) 616 (1871); Connecticut M. L. Ins. Co. v. Schaefer, 94 U. S. 457 (1876); Sides v. Knickerbocker L. Ins. Co., 16 Fed. 650 (1883); Appeal of Corson, 113 Pa. St. 438, 6 Atl. 213 (1886); Scott v. Dickson, 108 Pa. St. 6 (1884); Rittler v. Smith, 70 Md. 261 (1889) [creditor after payment of debt]. The well-known case of Godsall v. Boldero, 9 East 72 (1807), grew out of a policy issued on the life of England's great prime minister, William Pitt, taken out by a creditor. After Pitt's death his debts were paid by the nation, and it was held that as life insurance was a contract of indemnity there could be no recovery on the policy. But this case was overruled: Mowry v. Home L. Ins. Co., 9 R. I. 346 (1869); Loomis v. Eagle, etc., Ins. Co., 6 Gray (Mass.) 396 (1856); Rawls v. American M. L. Ins. Co., 27 N. Y. 282 (1863).

[21] Connecticut, etc., Ins. Co. v. Schaefer, 94 U. S. 457 (1876); Overhiser v. Overhiser, 63 Ohio St. 77, 50 L. R. A. 552 (1890), annotated.

[22] Tyler v. Odd Fellows', etc., Ass'n, 145 Mass. 134 (1887); Schonfield v. Turner, 75 Tex. 324, 7 L. R. A. 189 (1889).

[23] See § 62, *infra*.

[24] Crotty v. Union, etc., Ins. Co., 144 U. S. 621 (1892). In Manhattan L. Ins. Co v. Hennessy, 39 C. C. A. 625, it was said that this case

§ 61. Interest of beneficiary designated by insured.—Wager policies are held void because it is thought contrary to public policy "that one person should have an expectation of a benefit conditioned upon the happening of the death of another." It is therefore thought necessary that the temptation to destroy the life of the other in order to obtain such benefit must be balanced or counteracted by an insurable interest in the life. A person has an insurable interest in his own life, and the rule is assumed to have no application where the original contract is made by the insured. We therefore find the rule that one who takes an insurance upon his own life and pays the premiums may make the insurance payable to any person he may name in the policy, and that such person need have no interest in the life of the insured.[25]

As said in South Carolina,[26] "It is firmly established that insurance procured by one person on the life of another in which the party effecting the insurance has no interest is void as a wager contract, against public policy which condemns gambling speculations upon human life. But it is also well settled that a person may insure his own life and make the policy payable to whomsoever he chooses, even a beneficiary who has no insurable interest in his life, provided that

is not in its results in conflict with the previous statements of the court; that it is not necessary that the interest continue to the time of the death.

[25] Albert v. Mutual L. Ins. Co., 122 N. C. 92, 30 S. E. 327, 65 Am. St. 693 (1898); Union, etc., League v. Walton, 109 Ga. 1, 52 L. R. A. 442 (1899); Olmsted v. Keyes, 85 N. Y. 593 (1881); Sabin v. Phinney, 134 N. Y. 423 (1892); Vivar v. Supreme Lodge, 52 N. J. L. 455, 20 Atl. 36 (1890); Northwestern Masonic Aid Ass'n v. Jones, 154 Pa. St. 99, 35 Am. St. 810 (1893); Martin v. Stubbings, 126 Ill. 387, 9 Am. St. 620 (1889); Heinlein v. Imperial L. Ins. Co., 101 Mich. 250, 45 Am. St. 409, 25 L. R. A. 627 (1894); Clark v. Allen, 11 R. I. 439, 23 Am. Rep. 496 (1878); Amick v. Butler, 111 Ind. 578, 60 Am. Rep. 723 (1887); Murphy v. Red, 64 Miss. 614, 60 Am. Rep. 68 (1887); Mutual L. Ins. Co. v. Allen, 138 Mass. 24, 52 Am. Rep. 848 (1884); Fitzgerald v. Hartford, etc., Ins. Co., 56 Conn. 116, 7 Am. St. 288 (1888); Eckel v. Renner, 41 Ohio St. 232 (1884). *Contra*, Missouri Valley L. Ins. Co. v. Sturges, 18 Kan. 93, 26 Am. Rep. 761 (1877); Helmetag v. Miller, 76 Ala. 183, 52 Am. Rep. 316 (1884); Roller v. Moore, 86 Va. 512, 6 L. R. A. 136 (1889); Basye v. Adams, 81 Ky. 368 (1883). See note to 16 Am. St. 906. A mere friend has not an insurable interest, and can not be the beneficiary of a life insurance policy, although the insured voluntarily makes it payable to him: Caudell v. Woodward, 96 Ky. 646, 29 S. W. 614 (1895).

[26] Crosswell v. Connecticut Indemnity Ass'n, 51 S. C. 103, 28 S. E. 200 (1897).

the transaction is *bona fide* and not a mere cover to evade the law against wager policies. In such a case the interest which the insured has in his own life supports the policy and prevents it from being condemned as a wager contract." So, in Georgia it was said:[27] "Beyond all controversy a man has an insurable interest in his own life, and we fail to see when, having that interest, he entered into a contract with an insurer by which, for a stipulated sum, which he periodically pays, the insurer becomes liable to pay a given sum of money at the death of the insured, why he who is most interested, whether actuated by ties of relationship, motives of friendship, gratitude, sympathy or love, may not make the object of his consideration the recipient of his bounty. If it be replied that a temptation is extended to the beneficiary by improper means to hasten the time when he should receive the amount of the policy—and it is for this reason that such contracts will only be upheld when the idea of temptation is rebutted by the natural ties of blood or affinity—we might well ask ourselves why executory devises, bequests, provisions for support and maintenance provided for friends and even strangers, are not subject to the same inhibition as being against public policy. But while, as we have before said, many adjudicated cases, frequently contrary to natural justice, clearly hold that, unless the beneficiary or assignee has an insurable interest in the life of the insured, the policy or assignment is void, we shall undertake to show by authority that such is not the law." In nearly all the cases in which this rule has been applied the insured paid the premiums, but it has been held to apply even where the premiums were paid by the beneficiary.[27a]

§ **62. Interest of the assignee.**—The question whether a policy valid at its inception may afterwards, before the death of the insured, be assigned to one who has no insurable interest in the life of the insured, has been much discussed, and the authorities are in hopeless conflict.[28] It is universally admitted that wager policies are void, and that it is necessary to show that the contract is supported by an interest of some character sufficient to remove the objection that on grounds of public policy it is not well that it should be to the financial interest of A that B should cease to live. If no interest appears

[27] Union Fraternal League v. Walton, 109 Ga. 1, 46 L. R. A. 424 (1899).

[27a] Fidelity, etc., Ass'n v. Jeffords, 107 Fed. 402, 46 C. C. A. 377 (1901), and cases cited.

[28] See notes to Morrell v. Trenton Ins. Co., 57 Am. Dec. 103, and Currier v. Continental L. Ins. Co., 52 Am. Rep. 143.

the law will presume that the policy was taken out for a speculative purpose.[29] In ordinary property insurance the principle of indemnity makes the question easy of solution, but this does not apply to life insurance. There it must appear that the beneficiary has an interest in the continuance of the life resulting from some relation of contract, affinity, consanguinity or dependence supported by a moral obligation, or a reasonable expectation of benefit. Thus, if it appears that the beneficiary has such an interest as to remove the suspicion that the contract is a gambling or speculative transaction, the courts will not, as a general rule, investigate very carefully into the exact nature or value of the interest. Some courts are less liberal than others. Thus, it is held that the interest that exists when the contract is made must continue to the death of the insured, or, at least, must exist at that time, and that the assignee of a valid policy must also have an insurable interest in the life of the insured. It must be admitted that this doctrine is strictly logical and in accord with the reason of the rule which requires the existence of an interest. As said by Mr. Justice Field:[30] "If there be any sound reason for holding a policy invalid when taken out by a party who has no interest in the life of the assured, it is difficult to see why that interest is not as cogent and operative against a party taking out an assignment of a policy upon the life of a person in which he has no interest. The same ground which invalidates the one should invalidate the other—so far at least as to restrict the right of the assignee to the sums actually advanced by him." This rule prevails in Alabama,[31] Kansas,[32] Kentucky,[33] North Carolina,[34] Pennsylvania,[35]

[29] United Brethren Mut. Aid Soc. v. McDonald, 122 Pa. St. 324 (1888).

[30] Warnock v. Davis, 104 U. S. 775 (1881). That this is still the doctrine of the supreme court, see Manhattan L. Ins. Co. v. Hennessy, 39 C. C. A. 625, 99 Fed. 64 (1900).

[31] Stoelker v. Thornton, 88 Ala. 241, 6 So. 680 (1889). The disposition may be made by will: Alabama G. L. Ins. Co. v. Mobile Mut. Ins. Co., 81 Ala. 329, 1 So. 561 (1886); Helmetag v. Miller, 76 Ala. 183 (1884).

[32] Missouri Valley L. Ins. Co. v. McCrum, 36 Kan. 146, 12 Pac. 517 (1887); Missouri Valley L. Ins. Co. v. Sturges, 18 Kan. 93, 26 Am. Rep. 761 (1877).

[33] Basye v. Adams, 81 Ky. 368 (1883). An assignment is valid only in so far as necessary to secure advances made by the assignee: Beard v. Sharp, 100 Ky. 606, 38 S. W. 1057 (1897).

[34] Powell v. Dewey, 123 N. C. 103, 31 S. E. 381 (1898).

[35] Hoffman v. Hoke, 122 Pa. St. 377, 15 Atl. 437 (1883). The original beneficiary who assigned to one without interest can recover: Carpenter v. U. S. Life Ins. Co., 161

Texas,[36] Tennessee,[37] and the United States courts.[38] It is not, however, always followed to its logical conclusion, as all the reasons which forbid the assignment of a policy to a person without interest apply where there is a loss of interest. But an assignee without interest will be protected to the extent of the money advanced by him for the payment of premiums.[39] It is held in Texas that the beneficiary named in the policy, who has no interest, will hold the proceeds of the policy as trustee for the legal representatives of the insured, and that the assignee without interest will only hold it to the extent of his debt.[40] Mere want of interest in the assignee of a valid policy does not in this jurisdiction invalidate the policy. The insurer must perform his contract and leave it to the court to determine to whom the money belongs.[41]

§ 63. **Interest of the assignee, continued.**—The tendency in business life has been to liberalize the rules governing life insurance and thus to broaden its scope. It was found desirable that life insurance policies should pass freely by transfer and assignment, and so long as this was with the consent of the parties it was felt that the objections on the ground of public policy were largely illusory. Thus a more liberal rule has been adopted in many states, where it is held

Pa. St. 9, 32 L. R. A. 571 (1894); Keystone Mut. Ben. Ass'n v. Norris, 115 Pa. St. 446, 8 Atl. 638 (1886). A took out a policy on her life and assigned it to her husband, who, being subsequently unable to pay the premiums, assigned it absolutely to C to pay a debt, which, had A lived out her life expectancy, would have amounted to about the amount of the policy. This was held not a wagering policy: Wheeland v. Atwood, 192 Pa. St. 237, 43 Atl. 946, 73 Am. St. 803 (1899).

[36] Schonfield v. Turner, 75 Tex. 324, 12 S. W. 626 (1889); Price v. Supreme Lodge, 68 Texas 361 (1887). The policy in such case is for the benefit of the original beneficiary.

[37] Clement v. New York L. Ins. Co., 101 Tenn. 22, 46 S. W. 561 (1898) [notwithstanding incontestable clause].

[38] Connecticut, etc., Ins. Co. v. Schaefer, 94 U. S. 457 (1876.) See New York, etc., Ins. Co. v. Armstrong, 117 U. S. 591 (1886); Currier v. Continental L. Ins. Co., 52 Am. Rep. 134 (1885), annotated.

[39] Page v. Burnstine, 102 U. S. 664 (1880); Warnock v. Davis, 104 U. S. 775 (1881). See § 67, *infra*.

[40] The policy is valid and collectible; but the proceeds go to the parties legally entitled thereto: Equitable Life Ins. Co. v. Hazlewood, 75 Tex. 338, 16 Am. St. 893 (1889); Schonfield v. Turner, 75 Tex. 324, 7 L. R. A. 189 (1889).

[41] Cheeves v. Anders, 87 Tex. 287, 47 Am. St. 107 (1894).

that a policy supported by an interest at its inception is a mere chose in action, which may be assigned to a person who has no insurable interest in the life.[42] Such an assignment does not create a new contract, but merely continues the old contract in force. A person may thus insure his own life and either name or assign the policy to whomsoever he chooses without reference to the interest of such beneficiary in his life. The rule that the assignee of a valid policy need not have an insurable interest in the life prevails in California,[43] Colorado,[44] Georgia,[45] Illinois,[46] Indiana,[47] Maryland,[48] Massachusetts,[49] Mississippi,[50] New York,[51] Ohio,[52] Rhode Island,[53] Ver-

[42] See notes to 26 Am. St. 23; also, Hogue v. Minnesota Pack., etc., Co., 59 Minn. 39 (1894).

[43] Deering's Civil Code Cal., § 2764. See Curtiss v. Ætna, etc., Ins. Co., 90 Cal. 245, 25 Am. St. 114 (1891).

[44] Sheets v. Sheets, 4 Colo. App. 450, 36 Pac. 310 (1894).

[45] Union Fraternal League v. Walton, 109 Ga. 1, 46 L. R. A. 424 (1899).

[46] Martin v. Stubbings, 126 Ill. 387, 9 Am. St. 625 (1888); Bloomington Mut. B. Ass'n v. Blue, 120 Ill. 121, 60 Am. Rep. 558, 11 N. E. 331 (1887).

[47] State v. Tomlinson, 16 Ind. App. 662, 59 Am. St. 335 (1897); Amick v. Butler, 111 Ind. 578 (1887). In Prudential Ins. Co. v. Hunn, 21 Ind. App. 525, 52 N. E. 772 (1899), it was held that a policy issued to one upon the life of another who has no insurable interest, is a wagering contract and void. In Franklin L. Ins. Co. v. Hazzard, 41 Ind. 116, 13 Am. Rep. 313 (1872), the court said: "In our opinion, no one should hold a policy upon the life of another, in whose life he has no insurable interest at the time he acquired the policy, whether the policy be issued to him directly from the insurer or whether he acquire the policy by purchase and assignment from another." In Continental L. Ins. Co. v. Volger, 89 Ind. 572 (1883), it was held that the interest must be a pecuniary one, and hence a mother had not an insurable interest in the life of her son.

[48] Souder v. Home, etc., Soc., 72 Md. 511, 20 Atl. 137 (1890). See Clogg v. McDaniel, 89 Md. 416, 43 Atl. 795 (1899).

[49] Dixon v. National L. Ins. Co., 168 Mass. 48, 46 N. E. 430 (1897); Mutual L. Ins. Co. v. Allen, 138 Mass. 31 (1884).

[50] Murphy v. Red, 64 Miss. 614, 1 So. 761 (1887).

[51] Olmsted v. Keyes, 85 N. Y. 593 (1881); Valton v. National F. L. Ass'n, 20 N. Y. 32 (1859); Rawls v. American M. L. Ins. Co., 27 N. Y. 282 (1863); St. John v. American M. L. Ins. Co., 13 N. Y. 31, 64 Am. Dec. 529; Sabin v. Phinney, 134 N. Y. 423 (1892) [mutual benefit society certificate].

[52] Eckel v. Renner, 41 Ohio St. 232 (1884).

[53] Clark v. Allen, 11 R. I. 439; Cronin v. Vermont L. Ins. Co., 20 R. I. 570, 40 Atl. 497 (1898).

mont,[54] Wisconsin,[55] South Carolina,[56] and in England[57] and Canada.[58]

This doctrine seems to be supported by the weight of authority, but it must be noted that under either rule the essential fact is that the transaction must be *bona fide,* and not a mere cover for a wagering or speculative insurance or a device to evade the law. In fact, many of the cases which hold an assignment without interest void will, upon close examination, be found to rest upon the fact that the transaction in question was merely colorable and an attempt to obtain speculative insurance.[59]

§ 64. **Interest based upon relationship.**—Where no ties of blood or marriage exist, a person has an insurable interest in a life only when he is a creditor of, or surety for such party. Where there are ties of blood or marriage there must be a reasonable expectation of advantage from the continuance of the life. There is some conflict among the decisions as to the nature of the interest which grows out of the relationship which will support a policy of insurance. Where it is pecuniary, and the amount of the insurance bears some reasonable proportion to the interest, the contract is, of course, not a wager policy. If the reason for requiring an interest be as stated in many cases, that it is against public policy to tempt one person to deprive another of his life, it is apparent that certain ties of relationship are an ample protection. Hence, we find some decisions, and in our opinion the better ones, holding that near relationship, without any element of dependence, creates an insurable interest. A father has no direct pecuniary interest in the continuance of the life of a demented or crippled son, but it is little less than nonsense to say that public policy forbids such a father to insure the life of his child because of the danger that he will be tempted to take the life of the child. The common-sense rule is that there is an insurable interest sufficient to prevent the policy being a speculative contract where there is either a pecuniary interest, the relation of dependency, or any re-

[54] Fairchild v. Northeastern M. L. Ass'n, 51 Vt. 613 (1879).

[55] Strike v. Wisconsin, etc., Ins. Co., 95 Wis. 583, 70 N. W. 819 (1897); Bursinger v. Bank, etc., 67 Wis. 75, 58 Am. Rep. 848 (1886); Hurd v. Doty, 86 Wis. 1, 21 L. R. A. 746 (1893).

[56] Crosswell v. Connecticut Ind. Ass'n, 51 S. C. 103, 28 S. E. 200 (1897).

[57] Ashley v. Ashley, 3 Sim. 149 (1829).

[58] North American L. Assur. Co. v. Craigen, 13 Can. S. C. 278 (1886).

[59] See Clark v. Allen, 11 R. I. 439, 23 Am. Rep. 496 (1877).

lationship from which ordinary observation teaches that there is no real danger of placing temptation in the way of the beneficiary. All statements of this character must, however, be taken subject to the rule that where it is apparent that the transaction is merely a cover for a wager it will not be sustained by the courts.[60]

In one case the supreme court of the United States, which is very strict in requiring an insurable interest, said:[61] "The better opinion is that the decided cases which proceed upon the ground that the insured must necessarily have some pecuniary interest in the life of the *cestui que vie* are founded upon an erroneous view of the nature of the contract, that the contract of life insurance is not necessarily one merely of indemnity for a pecuniary loss, as in marine or fire policies, that it is sufficient to show that the policy is not invalid as a wager policy, if it appears that the relation, whether of affinity or consanguinity, was such between the person whose life was insured and the beneficiary named in the policy, as warrants the conclusion that the beneficiary had an interest, whether pecuniary or arising from dependence or mutual affection, in the life of the person insured."

Mr. Joyce says:[62] "The general rule, as deduced from a majority of the cases, would seem to be, however, that the interest must rest upon a purely pecuniary basis, or, in case of consanguinity or affinity, there is a sufficient interest where they involve a reasonable claim to support or some benefit or advantage to be derived from the continuance of the life insured." A much narrower view is adopted in many cases. Thus, in North Carolina it was said:[63] "Except in a case where there are ties of blood or marriage, the expectation of advantage from the continuance of the life insured, in order to be reasonable, as the law counts reasonableness, must be founded in the existence of some contract between the person whose life is insured and the beneficiary, the fulfillment of which the death will prevent; it must appear that by the death there may come damage which can be estimated under some rule of law, for which loss or damage the insurance company has undertaken to indemnify the beneficiary under its pol-

[60] That insurable interest is not confined to any particular class of persons or relationship, see Kentucky, etc., Ins. Co. v. Hamilton, 63 Fed. 93, 11 C. C. A. 42 (1894).

[61] Ins. Co. v. Bailey, 13 Wall. (U. S.) 616 (1871).

[62] Joyce Ins., § 899. See United Brethren, etc., Soc. v. McDonald, 122 Pa. St. 324, 1 L. R. A. 238 (1888).

[63] Trinity College v. Travelers' Ins. Co., 113 N. C. 244, 18 S. E. 175 (1893).

icy. When this contractual relation does not exist, and there are no ties of blood or marriage, an insurance policy becomes what the law denominates a wagering contract, and under its rules, made and enforced in the interest of the best public policy, all such contracts must be declared illegal and void, no matter what good object the parties may have had in view. The end will not, in the eyes of the law, justify the means."

§ 65. **Interest based upon relationship, continued.**—The circuit court of appeals recently held that the mere relation of father and son is not enough to give an adult son an insurable interest in the life of his father.[64] After reviewing the decisions the court said: "The sum of the decisions and of text-book discussions upon the subject of insurable interest may, we think, be fairly stated thus: No person has an insurable interest in the life of another unless he would in reasonable probability suffer a pecuniary loss, or fail to make a pecuniary gain, by the other's death; or (in some jurisdictions) unless, in the discharge of some undertaking, he has spent money, or is about to spend money, for the other's support or advantage. The extent of the insurable interest—the amount for which a policy may be taken out, or for which recovery may be had—is not now under consideration. What is often called 'relationship insurance' must be governed by this rule. It must rest upon the foundation of a pecuniary interest, although the interest may be contingent, and need not be capable of exact estimation in dollars and cents. Sentiment or affection is not sufficient of itself, although it may often be influential in persuading a court or jury to reach the conclusion that a beneficiary had a reasonable expectation of pecuniary advantage from the continued life of the insured. In one relation only—the relation of husband and wife—is the actual existence of such a pecuniary interest unimportant; the reason being that a real pecuniary interest is found in so great a majority of cases that the courts conclusively presume it to exist in every case, whatever the fact may be, and therefore will not inquire into the true state of a few exceptional instances. This, we think, is essentially what is meant by the declaration of courts and text-book writers that the mere relationship of husband and wife is sufficient to give an insurable interest. The supreme court of Ver-

[64] Life Ins. Clearing Co. v. O'Neill, 106 Fed. 800, 45 C. C. A. 641, 54 L. R. A. 225, annotated (1901).

mont[65]—alone, we think, among judicial tribunals—seems disposed to hold the presumption to be rebuttable. * * *

"In all other relationships there is no presumption of interest, and no insurable interest exists unless the reasonable likelihood of pecuniary loss or gain is present in actual fact. No doubt, judicial language is to be found supporting the view that the mere relationship of parent and child is sufficient to give an insurable interest.

"We think it can not be doubted that the tendency of the recent decisions is to insist upon an actual or presumed pecuniary interest in every case (although such interest may no doubt be contingent, and to some extent undefined), and to give relationship its proper place by regarding it merely as an important factor in the inquiry, whether such an interest does in reality exist. If, then, the test of pecuniary interest is to be applied to the facts of the present case, it is clear that the son had no insurable interest in his father's life. Again, laying aside the effect of the poor law of Pennsylvania, it is plain that the son would lose nothing by his father's death, and would gain nothing by his father's continuance in life. His father did not support him, and he himself had not spent, nor was he about to spend, any money in his father's behalf or support. Upon principle, therefore, we think that the policy can not be supported."

§ 66. Illustrations of insurable interest in life.—The following instances will illustrate the extent and nature of the interest which will sustain a contract of life insurance. A creditor has an insurable interest in the life of his debtor, at least for the amount of his debt.[66] In states which permit the assignment of a valid policy to an assignee without interest the creditor is allowed to hold the entire insurance,[67] but where the stricter rule prevails, the creditor, whether named as the original beneficiary or one to whom the policy has been assigned, has no further interest after the payment of his debt, and the policy thus becomes one for the benefit of the insured, to be collected by his personal representatives.[68] This certainly is the rule where

[65] Currier v. Continental L. Ins. Co., 57 Vt. 496 (1885).

[66] See § 58, *supra;* Rittler v. Smith, 70 Md. 261, 2 L. R. A. 844 (1889); Walker v. Larkin, 127 Ind. 100, 26 N. E. 684 (1890).

[67] In Wright v. Mutual Ben. L. Ass'n, 118 N. Y. 237, 16 Am. Rep. 749 (1890), it was held that the assignee of the creditor payee could recover the whole amount, although the debt was less.

[68] Ulrich v. Reinoehl, 143 Pa. St. 238, 13 L. R. A. 433 (1891); Cooper v. Shaeffer (Pa.), 11 Atl. 548 (1887).

the policy is merely assigned the creditor as a security for his debt. He should be permitted to retain out of the proceeds of the policy what is necessary to pay his debt, and be required to account for the balance to the representatives of the deceased.[69] In all cases a financial interest, however slight, will sustain the policy. A creditor has no insurable interest in the life of his debtor's wife.[70] A corporation has no insurable interest in the life of one of its stockholders who is not indebted to it.[71] A woman has an insurable interest in the life of the man to whom she is engaged to be married, although he has at the time a wife living, when he represented himself to her as a single man and she believed he was legally competent to marry her.[72] A husband has an insurable interest in the life of his wife.[73] A religious society supported largely through voluntary contributions has no insurable interest in the life of one of its members.[74] A man may take a policy on his own life and make it payable to one to whom he is engaged to be married.[75] This applies to the certificate of a benevolent society when not prohibited by the statutes or rules of the society.[76] One partner has an insurable interest in the life of the other partner,[77] but some cases hold that the interest ceases when the latter retires unindebted from the firm.[78] A woman to whom a man is

[69] Barbour v. Larue, 21 Ky. L. 94, 51 S. W. 5; Roller v. Moore, 86 Va. 512, 6 L. R. A. 136 (1889); Exchange Bank v. Loh, 104 Ga. 446, 44 L. R. A. 372 (1898).

[70] Wheeland v. Atwood, 192 Pa. St. 237, 42 W. N. C. 178.

[71] Tate v. Commercial, etc., Ass'n, 97 Va. 74, 33 S. E. 382 (1899).

[72] Taylor v. Travelers' Ins. Co., 15 Tex. Civ. App. 254, 39 S. W. 185 (1897); Bogart v. Thompson, 24 Misc. (N. Y.) 581 (1898) [a benevolent society certificate payable "to his wife"].

[73] Currier v. Continental L. Ins. Co., 57 Vt. 496, 52 Am. Dec. 134. See § 65, *supra*.

[74] Trinity College v. Travelers' Ins. Co., 113 N. C. 244, 22 L. R. A. 291 (1893).

[75] Lemon v. Phœnix, etc., Ins. Co., 38 Conn. 294 (1871); Chisholm v. National Capitol L. Ins. Co., 52 Mo. 213 (1873).

[76] In the absence of anything to the contrary in the charter or by-laws or certificate, a mutual benefit society contract will be controlled by the ordinary principles governing other insurance: Union Fraternal League v. Walton, 109 Ga. 1, 46 L. R. A. 424 (1899).

[77] Ins. Co. v. Luchs, 108 U. S. 498 (1882). See notes in 57 Am. Dec. 98, 52 Am. Rep. 140, 46 Am. Rep. 190. In Powell v. Dewey, 123 N. C. 103, 31 S. E. 381 (1898), it was held that where the partners have no money invested, and neither is indebted to the other, neither partner has an insurable interest in the life of his copartner.

[78] Cheeves v. Anders, 87 Tex. 287, 25 S. W. 324, 47 Am. St. 107 (1894).

engaged to be married does not come within the meaning of a rule permitting a mutual benefit certificate to be made payable to a person "dependent" upon the deceased. "Dependence for favor, or for affection, or for companionship, or as servant or retainer, is excluded."[79] A sister has an insurable interest in the life of her brother who stands *in loco parentis*.[80] A child is presumed to have an insurable interest in the life of its parent,[81] a sister in the life of her brother,[82] and a father in the life of a minor son.[83] It is said that where the relationship of brother and sister appears it is incumbent upon the company to show that notwithstanding such fact the policy is a wager contract.[84] A niece has an insurable interest in the life of an uncle who has reared her and continued to contribute to her support after her marriage.[85] A grandson has an insurable interest in the life of his grandfather.[86] A son-in-law has no insurable interest in the life of his mother-in-law, who lives with him and is dependent upon him for support.[87] But a mother-in-law has been held to have an insurable interest in the life of her son-in-law.[88] A stepson has no insurable interest in the life of his stepfather,[89] but a stepfather is a "relative", who may be made the beneficiary of a benefit certificate.[90] A grandfather has an insurable interest in the life of his grandson.[91] A mere assumption of parental relations, without any legal obligation, by a man toward a girl whom he has educated will sustain a policy which he procures and assigns to her. The court stated that the test was whether the circumstances were such as to justify the belief that

[79] Alexander v. Parker (Ill.), 19 L. R. A. 187, note. *Contra*, McCarthy v. Supreme Lodge, 153 Mass. 314, 11 L. R. A. 144 (1891).

[80] Lord v. Dall, 12 Mass. 115 (1815).

[81] Crosswell v. Connecticut Indemnity Ass'n, 51 S. C. 103, 28 S. E. 200 (1897).

[82] Hosmer v. Welch, 107 Mich. 470, 65 N. W. 280, 67 N. W. 504 (1895).

[83] Loomis v. Eagle, etc., Ins. Co., 6 Gray (Mass.) 396 (1856). So by statute: C. L. Mass., § 7212 (1897).

[84] Ætna L. Ins. Co. v. France, 94 U. S. 561 (1876); Crosswell v. Connecticut Indemnity Ass'n, 51 S. C. 103; United Brethren, etc., Soc. v. McDonald, 122 Pa. St. 324 (1888); Equitable L. Ins. Co. v. Hazlewood, 75 Tex. 338, 7 L. R. A. 217 (1889).

[85] McGraw v. Metropolitan L. Ins. Co., 41 W. N. C. (Pa.) 62 (1897).

[86] Elkhart, etc., Ass'n v. Houghton, 103 Ind. 286 (1885).

[87] Stambaugh v. Blake (Pa.), 15 Atl. 705 (1888).

[88] Adams v. Reed, 18 Ky. L. 858, 38 S. W. 420 (1896).

[89] United Brethren, etc., Soc. v. McDonald, 122 Pa. St. 324, 11 L. R. A. 238 (1888).

[90] Simcoke v. Grand Lodge, 84 Iowa 383, 15 L. R. A. 114 (1892).

[91] Hilliard v. Sanford, 4 Ohio N. P. 363.

his death would result in a pecuniary loss to her.[92] In a recent case, where the rule was applied with much liberality, it was held that an aunt had an insurable interest in the life of her niece, who had lived with her from earliest childhood and been supported by her. After reviewing the cases, the court said:[93] "The principle of these and other like cases is that the interest does not depend upon any liability for support, nor upon any pecuniary consideration, nor even upon kinship. It may be for the benefit of the old or the young, where the relation between the parties is such as to show mutual interest and to rebut the presumption of a mere wager. The contract is complete and legal in itself, and when considerations of public policy do not prohibit its enforcement, there is no reason why it should not be carried out. The declaration in this case shows that the plaintiff's claim is not an objectionable one on the grounds of public policy. It shows that the relation of the plaintiff and her niece had been of such a character that each had reason to rely upon the other in case of need. Should the younger die first, the help and care which might have been expected from her in the declining years of the aunt could only be supplied by insurance upon her life. This is no more speculation than a husband's provision for his wife in the same way."

A woman living with a man as his wife, although not such, has an insurable interest in his life.[94]

In many states the right of a wife to insure her husband's life and hold the proceeds free from the claims of his creditors is secured by statute.[94a]

§ 67. **Right of assignee without interest to recover premiums paid.**—Where the assignee of a policy has no insurable interest and is free from fraud, he will ordinarily be protected to the extent of the money actually paid out by him.[95] But he can retain only enough of the proceeds of the policy to reimburse him for premiums paid and expenses incurred and interest thereon. He can only properly collect this amount from the company, and if the full amount of the policy is paid to him he must account for the balance to the repre-

[92] Carpenter v. U. S. L. Ins. Co., 161 Pa. St. 9, 25 L. R. A. 571 (1894).

[93] Cronin v. Vermont L. Ins. Co., 20 R. I. 570, 40 Atl. 497 (1898).

[94] "A woman illegally married because the husband has a lawful wife, or living unlawfully with a man as his wife, has an insurable interest in the man's life:" Lampkin v. Travelers' Ins. Co., 11 Colo. App. 249, 52 Pac. 1040 (1898).

[94a] See note to Metropolitan L. Ins. Co. v. Smith (Ky.), 53 L. R. A. 817 (1900), citing many cases.

[95] Helmetag v. Miller, 76 Ala. 183, 52 Am. Rep. 316 (1884).

sentatives of the insured. It is immaterial whether the policy is made payable directly to him or to the assured and afterwards assigned.[96] In a recent case in Kentucky a benefit certificate, valid at its inception, was thereafter assigned in part to one who had no insurable interest, but who agreed to pay the future assessments in consideration of receiving one-half of the proceeds of the policy upon the death of the insured. The full amount of the policy was paid to the assignee, and it was held that the legal beneficiary could collect from him all the money so paid less the amount of the assessments actually paid. The court said:[97] "It seems to us that the appellee in this case could have legally held the benefit certificate for no other purpose than as security to indemnify him for moneys advanced to pay the premiums and to be advanced; and to this extent his claim to said policy was just; but all overplus of said fund he holds as trustee for the benefit of the appellant in this action, and under an implied obligation to pay over the same."

Where the rules of the policy provide that no policy shall be issued upon the life of a person without the consent of such person indorsed upon the application, and a policy is issued in violation of such rules, a beneficiary who was a party to the procurement of the contract which was a fraud upon the company can not recover the premiums paid.[98]

But where the plaintiff was induced to procure such a policy by the fraudulent statement of the agent of the company he was permitted to recover the money paid as premiums. In this case the plaintiff had taken out the insurance for the benefit of his daughter. The court said:[99] "The plaintiff, therefore, would be entitled to recover unless he made a wagering contract or was a party to the fraud of the defendant's agent. There is nothing in the case to show that the plaintiff derived any benefit either direct or indirect, so that it could not be ruled as a matter of law that the transaction was a wager or was other than a gift for the benefit of his daughter."

[96] Tate v. Commercial Bldg. Ass'n, 97 Va. 74, 33 S. E. 382 (1889); New York L. Ins. Co. v. Davis, 96 Va. 737, 44 L. R. A. 305 (1899); Stambaugh v. Blake (Pa.), 15 Atl. 705 (1888); Riner v. Riner, 166 Pa. St. 617 (1895).

[97] Beard v. Sharp, 100 Ky. 606 (1897); Caudell v. Woodward, 96 Ky. 646 (1895). See Mutual L. Ins. Co. v. Blodgett, 8 Tex. Civ. App. 45, 27 S. W. 286 (1894).

[98] Fisher v. Metropolitan L. Ins. Co., 160 Mass. 386 (1894).

[99] McCann v. Metropolitan L. Ins. Co., 177 Mass. 280, 58 N. E. 1026 (1901).

§ 68. Want of interest as a defense under incontestable clause.—A clause in a policy making it incontestable on any ground after the lapse of a specified time does not prevent the insured from defending an action to recover after loss upon the ground that the policy was a wager contract. Where this was attempted the court said[100] that "the clause by which the company stipulated that this policy should not be disputed after one year does not help the respondent's case. Private interest must give way before public interests. The stipulation itself is contrary to law and order. The company's defense in this case is certainly not a deserving one, but a defense like theirs to an action of this nature is allowed not for the sake of the defendant, but of the law itself. There can be no waiver of such an objection."

This seems to be about the only defense that is not covered by such a clause. Where the assignee of a policy is required to have an insurable interest he is not enabled to recover by reason of the policy containing such a clause.[101] By the weight of authority an incontestable clause prevents the company from interposing the defense of fraud after the expiration of the prescribed period. It is not an agreement to condone fraud, which would be void on the grounds of public policy, but is in the nature of a statute of limitations. There is no objection to an agreement upon the part of the company that after the expiration of a reasonable time in which to investigate the facts it will thereafter waive even the defense of fraud.[102]

§ 69. Fact of insurable interest must be pleaded.—In an action on an insurance contract the burden of showing an insurable interest in the beneficiary is on the plaintiff. Hence, a complaint which fails to allege such interest is bad on demurrer.[103] An insurable interest

[100] Manufacturers' L. Ins. Co. v. Anctil, 28 Can. S. C. 103 (1897).

[101] Clement v. New York L. Ins. Co., 101 Tenn. 22, 46 S. W. 561, 42 L. R. A. 247 (1889).

[102] Murray v. Mutual, etc., L. Ass'n (R. I.), 53 L. R. A. 742 (1901); Clement v. New York L. Ins. Co., 101 Tenn. 22, 46 S. W. 561 (1889); Wright v. Mutual Ben. L. Ass'n, 118 N. Y. 237, 6 L. R. A. 731 (1890) [limiting time to sue]; Brady v. Prudential Ins. Co., 168 Pa. St. 645 (1895); Massachusetts Ben. L. Ass'n v. Robinson, 104 Ga. 256, 42 L. R. A. 261, note (1898); Patterson v. Natural Prem. Mut. L. Ins. Co., 100 Wis. 118, 42 L. R. A. 253 (1898). See article in 45 Cent. L. J. 425. In Welch v. Union Cent. L. Ins. Co., 108 Iowa 224, 50 L. R. A. 774 (1899), it was held that an incontestable clause in a policy does not prevent the insurance company from availing itself of the defense of fraud even after the time limit has passed.

[103] Western Assur. Co. v. McCarty, 18 Ind. App. 449, 48 N. E. 265 (1897), citing other cases.

is a question of law dependent upon the facts, and if the pleading states the facts from which the conclusion of an insurable interest may be drawn, it is sufficient.[104]

§ 70. **Description of interest.**—If the subject in which the interest exists is correctly described, it is not necessary that the particular interest of the insured be stated in the policy unless it is called for by the company. Thus, an applicant for insurance is not required to show the exact condition of his title unless requested so to do.[105] This is the general rule, but where the interest is of such a nature as to affect the character of the risk it should be fully disclosed. Thus, profits should be insured as such.[106] Where the question was whether the applicant had correctly described his title, Chief Justice Marshall said:[107] "The description was insufficient, as a precarious title depending for its continuance on events which might or might not happen is not such a title as is generally described in the offer for insurance construing the words of the offer as they are fairly to be understood."

[104] Prudential Ins. Co. v. Hunn, 21 Ind. App. 525, 52 N. E. 772 (1899); Northwestern, etc., Ins. Co. v. Woodward, 18 Tex. Civ. App. 496, 45 S. W. 185 (1898).

[105] Prudential Ins. Co. v. Hunn, 21 Ind. App. 525, 52 N. E. 772 (1899), and cases cited; Hall v. Niagara F. Ins. Co., 93 Mich. 184, 32 Am. St. 497 (1892); Riggs v. Commercial M. Ins. Co., 125 N. Y. 7, 21 Am. St. 717 (1890); Rochester Loan & B. Co. v. Liberty Ins. Co., 44 Neb. 537, 48 Am. St. 745 (1895); Kenton Ins. Co. v. Wigginton, 89 Ky. 330, 7 L. R. A. 81; Mackenzie v. Whitworth, L. R. 1 Ex. Div. 36, 13 Eng. R. Cas. 322 and notes (1875).

[106] Niblo v. North American F. Ins. Co., 1 Sandf. (N. Y. Super.) 551 (1848).

[107] Columbian Ins. Co. v. Lawrence, 2 Pet. (U. S.) 25 (1829); Morrison v. Tennessee, etc., Ins. Co., 18 Mo. 262, 59 Am. Dec. 299 (1853).

PART III.

OF MATTERS THAT RENDER THE CONTRACT VOID OR UNAVAILABLE.

CHAPTER V.

NON-DISCLOSURE OF MATERIAL FACTS.

§ 78. **In general.**—The first step toward effecting a contract of insurance is the application. It may be oral, but it is usually made upon a printed form prepared and furnished by the insurance company. The written application is always used when applying for insurance other than against loss by fire. This application, which the applicant is required to sign, contains numerous inquiries calling for specific information with reference to matters deemed material by the company. They are directed to things of which the applicant is presumed to have knowledge, and of which the company should be informed in order to determine whether it will accept the risk, and, if so, upon what terms and conditions. This application, when duly filled out and signed by the applicant, is forwarded to the company,

and contains the information upon which the company relies in accepting the risk and issuing its written policy.[1]

§ 79. **Duty of applicant.**—The person applying for insurance owes a duty to the proposed insurer, which requires that he shall put him in possession of all facts which are within his knowledge, or which it is his duty to know, and which it is material that the insurer should know. The concealment or misstatement of material matters may justify the insurer in repudiating the obligation of the contract, even after there has been a loss. This subject is commonly discussed under the heads of concealment and misrepresentation and relates simply to those matters which induce the contract.

Those statements which are warranted are inserted in the contract and constitute one of the provisions or conditions of the printed policy.

§ 80. **Concealment—Definition.**—In the law of insurance, the intentional withholding from the insurer of facts which are material and prejudicial to the risk, and which ought in good faith to be known to the insurer, is called concealment. It has been said that "every fact and circumstance which can possibly influence the mind of the insurer in determining whether he will underwrite the policy, and at what premium, is material to be disclosed, and concealment thereof will vitiate the policy."[2]

§ 81. **Rule as affected by the character of the insurance.**—The English courts recognize but one rule and apply it to all insurance contracts. "I am not prepared," said Sir George Jessel,[3] "to lay down the law as making any difference in substance between one contract of insurance and another. Whether it is life, or fire, or marine

[1] As to the requirement that the application must be signed by the applicant, see Somers v. Kansas Prot. Union, 42 Kan. 619, 22 Pac. 702 (1889). The statements may be adopted by an applicant who does not sign the application: Prudential Ins. Co. v. Fredericks, 41 Ill. App. 419 (1891).

[2] Ely v. Hallett, 2 Caines (N. Y.) 57 (1804), note.

[3] London Assurance v. Mansel, L. R. 11 Ch. Div. 363, 367 (1879); Lindenau v. Desborough, 8 Barn. & C. 586 (1828). In the leading case of Carter v. Boehm, 2 Burr. 1905 (1766), the rule in marine insurance is stated as it now prevails in England and the United States. See Sun Mut. Ins. Co. v. Ocean Ins. Co., 107 U. S. 485 (1882).

insurance, I take it, good faith is required in all cases, and, although there may be certain circumstances from the peculiar nature of marine insurance which require to be disclosed, and do not apply to other contracts of insurance, that is rather, in my opinion, an illustration of the application of the principle than a distinction in principle."

This rule was recently applied in the house of lords to a contract involving the solvency of a guarantor on a promissory note. It appeared that there were facts known to the applicant affecting the financial condition of the maker of the note and the guarantor, which were not known to the company; and it was held that the concealment of such facts prevented a recovery on the policy.[4]

This strict rule of the English courts is applied to marine insurance in this country, but by the weight of authority it does not govern other kinds of insurance contracts. The unusual conditions which surround the contract of marine insurance are not present when an application is made for life or fire insurance, and much importance has been given to the general practice of insurance companies, which require applicants to sign written applications containing answers to a great number of specific inquiries. In such cases the inference is that the company has made inquiry for the purpose of eliciting information with reference to all the facts of which it desires information, and the applicant is thus excused from volunteering any statement with reference to other matters, unless of some extraordinary character, or the suppression of which is fraudulent.[5] In some of the earlier cases the rule of marine insurance was applied to fire insurance contracts. Thus, Mr. Justice Story said:[6] "The rules as to misrepresentations and concealments, or omissions to state facts material to the risk, are more strict in cases of marine than in fire insurance. But the differences are founded on the difference in the character of the property and of the greater facilities insurers possess for obtaining information as to conditions and surrounding circumstances in cases of insurance on buildings, etc., than on vessels which are often insured when absent or afloat, and the distinctions are applied ordinarily in cases where the insurer sets up the omission of the

[4] Seaton v. Heath, 68 L. J. Q. B. (N. S.) 631 (1899).

[5] Phœnix Ins. Co. v. Raddin, 120 U. S. 183 (1886); Vankirk v. Citizens' Ins. Co., 79 Wis. 627, 48 N. W. 798 (1891); Wytheville Ins. Co. v. Stultz, 87 Va. 629, 13 S. E. 77 (1891).

[6] Carpenter v. American Ins. Co., 1 Story (C. C.) 57 (1839).

insured to state material facts. In these cases there is a difference between the rules applicable to marine and fire insurance. But where the defense is a material affirmative misrepresentation as to a matter which is presumably within the knowledge of the party applying for the insurance, and as to which the insurer has not the same means of knowledge, there is no ground for any distinction between cases of fire and marine insurance."

§ 82. **Modern rule in the United States.**—The question was recently given elaborate consideration in the circuit court of appeals, and the conclusion reached that, by the weight of authority in this country, the strict rules which govern the contract of marine insurance do not apply to other insurance contracts.[7] After noting the practice of making full inquiry by specific questions, and the different nature of the conditions and circumstances surrounding the parties and the risk, the court said that the insured "can only be said to fail in his duty to the insurer when he withholds from him some fact, which, though not made the subject of inquiry, he nevertheless believes to be material to the risk, and actually is so, for fear it would induce a rejection of the risk, or, what is the same thing, with fraudulent intent. * * * Nor does this rule result in practical hardship to the insurer, for in every case where the undisclosed fact is palpably material to the risk, the mere non-disclosure is itself strong evidence of fraudulent intent. Thus, if a man about to fight a duel should obtain life insurance without disclosing his intention, it would seem that no argument or additional evidence would be needed to show the fraudulent character of the non-disclosure. On the other hand, where men may reasonably differ as to the materiality of a fact concerning which the insurer might have elicited further information, and did not do so, the insurer occupies no such position of disadvantage in judging of the risk as to make it unjust to require that before the policy is avoided it shall appear not only that the undisclosed fact was material, but also that it was withheld in bad faith. To hold that good faith is immaterial in such a case is to apply the harsh, rigorous rule of marine insurance to a class of insurance contracts differing so materially from marine policies in the circumstances under which the contracting parties agree that the reason for the rule ceases. The au-

[7] Penn Mut. Life Ins. Co. v. Mechanics', etc., Co., 72 Fed. 413, 19 C. C. A. 286 (1896).

thorities are not uniform, and we are able to take that view which is more clearly founded in reason and justice." After referring to certain cases the court further said: "We think the modern tendency, even of Massachusetts decisions, is to require that a non-disclosure of a fact not inquired about shall be fraudulent before vitiating the policy, and, as already stated, this view is founded upon the better reason. The subject is by no means as clear upon the authorities as could be wished."

§ 83. **What must be communicated.**—The recognized rule is that each party to a contract of insurance must communicate to the other in good faith all facts within his knowledge which are, or he believes to be, material to the risk, and which the other has not the means of ascertaining and as to which no warranty is made. If specific information is required by the insurer on any point he deems material it must be fully and correctly communicated.[8] On the other hand, neither party is required to communicate information except in answer to inquiries of—

(1) Matters which the other, or his duly authorized agent, knows.

(2) Matters of which, in the exercise of ordinary care, the other, or his duly authorized agent, ought to know, and of which the applicant has no reason to believe he is ignorant.[9]

[8] Valton v. National Fund L. Assur. Co., 20 N. Y. 32 (1859); Norwich F. Ins. Co. v. Boomer, 52 Ill. 442 (1869). The applicant is not bound to disclose the nature of his interest, unless interrogated with reference thereto: See § 70, *supra*. In Tate v. Hyslop, L. R. 15 Q. B. D. 368 (1885), Lord Justice Bowen said: "It is established law that a person dealing with underwriters must disclose to them all the material facts which are known to himself and not to them, or at all events all facts which they are not bound to know. What are material facts has been defined by authority. It is the duty of the assured to communicate all facts within his knowledge which would anect the mind of the underwriters at the time the policy is made, either as to taking the contract of insurance, or as to the premium on which he would take it. The materiality of the fact depends upon whether or no a prudent underwriter would take the facts into consideration in estimating the premium or in undervaluing the policy." See § 84, *infra*.

[9] Carter v. Boehm, 2 Burr. 1905 (1766), Lord Mansfield; Green v. Merchants' Ins. Co., 10 Pick. (Mass.) 402 (1830); Richards v. Washington F. & M. Ins. Co., 60 Mich. 420 (1886). The innocent concealment of matters which may be discovered by an examination of the property has no effect: Continental Ins. Co. v. Kasey, 25 Gratt. (Va.) 268 (1874); same rule under statute: Insurance Co. v. Leslie, 47 Ohio St. 409

(3) Matters of which information is waived.

(4) Matters which prove or tend to prove the existence of a risk excluded by a warranty, and which are not otherwise material.[10]

(5) Matters which relate to a risk excepted from the policy and not otherwise material.

(6) Mere matters of opinion or belief.

§ 84. **Where specific inquiries are made.**—As already stated, the strict rule governing concealment in cases of marine insurance is somewhat relaxed in the case of fire and life insurance. From the nature of the risk the insurer may fairly be presumed to have a better knowledge of the circumstances, and the practice of making specific inquiries with reference to matters of which the insurer desires information may well suggest the conclusion that all material facts are called for. It has therefore been held that where there is a written application containing answers to specific questions, an innocent failure by an applicant for fire insurance to communicate facts about which he is not asked, will not avoid the policy,[11] and the same rule undoubtedly applies to life insurance. But this must be taken in connection with the statement that actual fraud always vitiates the contract, and subject to the provision that the insured must communicate all knowledge which he has, or is by law required to have, of unusual or extraordinary circumstances of peril to which the property is exposed, when the same could not with reasonable diligence be known by the insurer or reasonably anticipated by him as the foundation of suitable inquiries.[12] This is illustrated by a case where the applicant knew that an attempt had been made to burn the building which was the subject-matter of the insurance.[13] The rule is not

(1890). As to constructive knowledge of facts where the insurance company is required by its charter or by-laws to make a survey, see Satterthwaite v. Mutual Ben. Ins. Ass'n, 14 Pa. St. 393 (1850).

[10] DeWolf v. New York, etc., Ins. Co., 20 John. (N. Y.) 214 (1822) [marine case].

[11] Washington Mills Mfg. Co. v. Weymouth Ins. Co., 135 Mass. 503 (1883); Browning v. Home Ins. Co., 71 N. Y. 508 (1887); Boggs v. America Ins. Co., 30 Mo. 63 (1860); Penn Mut. L. Ins. Co. v. Wiler, 100 Ind. 92 (1884); Sibley v. Prescott Ins. Co., 57 Mich. 14 (1885); Carson v. Jersey City Ins. Co., 43 N. J. L. 300, 39 Am. Rep. 584, 44 N. J. L. 210 (1881); Campbell v. American F. Ins. Co., 73 Wis. 100 (1888); Hosford v. Germania F. Ins. Co., 127 U. S. 399 (1887).

[12] Hartford, etc., Ins. Co. v. Harmer, 2 Ohio St. 452, 59 Am. Dec. 684 (1853); North American, etc., Ins. Co. v. Throop, 22 Mich. 146 (1871).

[13] Walden v. Louisiana Ins. Co., 12

changed by a provision in the policy that full disclosure must be made concerning the matters to which the specific questions relate.[14]

§ 85. **Basis of the rule.**—Language will be found in some of the books which suggests that fraud, actual or constructive, is the foundation of the concealment which will prevent the enforcement of a contract of insurance. Arnould says that the doctrine in the English courts is that, although no pretext exists for anything like actual fraud, yet the policy is to be considered void on the ground of constructive or legal fraud. His reason for adhering to this phraseology is that, as a representation, through mistake or inadvertence, has the same effect as an intentional and literally false representation or concealment—that is, if induces the insurer to enter into a contract which he would otherwise have declined, or to take a less premium than he would otherwise have demanded—it is at least excusable to apply the word fraud; and this brings the doctrine upon a subject nominally within the acknowledged general principles applicable to other contracts.[15] But it is somewhat misleading, and it is much better to state the doctrine in direct terms—that it is an implied condition of the contract of insurance that it is free from misrepresentation or concealment, whether fraudulent or through mistake.[16] Lord Esher thus stated the rule:[17] "The freedom from misrepresentation or concealment is a condition precedent to the right of the insured to insist on the performance of the contract, so that on a failure of the performance of the condition, the assured can not enforce the contract." In the same case, Lord Justice Lindley said that in his opinion Duer and Phillips are right in concluding that fraud on the part of the assured is not essential to discharge the insurer on the ground of misrepresentation or concealment. This principle governs all cases of marine insurance in the United States as well as in England, and has been applied to many cases of other kinds of insurance. But it is inconsistent with the principle of those cases which hold that an innocent misrepresentation will not avoid the policy.

La. 134, 32 Am. Dec. 116 (1838); Bebee v. Hartford County M. F. Ins. Co., 25 Conn. 56, 65 Am. Dec. 553 (1856). But see German-Amer. Ins. Co. v. Norris, 100 Ky. 29, 66 Am. St. 324 (1896).

[14] Dunbar v. Phenix Ins. Co., 72 Wis. 492, 40 N. W. 386 (1888). Or by a refusal to answer a question: American L. Ins. Co. v. Mahone, 56 Miss. 180 (1878).

[15] Arnould Mar. Ins. 514.

[16] Phillips Ins., §§ 287, 537.

[17] Blackburn v. Vigors, 55 L. J. Q. B. (N. S.) 347, L. R. 17 Q. B. D. 578 (1886).

§ **86. Where no written application is made.**—Where the insurer asks no questions and the applicant makes no representations, and there is no written application, there are cases which relieve the applicant from any duty to make a disclosure unless the concealment is fraudulent. Under this rule, where no inquiries are made, the intention of the party becomes very material. It is said that where there is no written application for fire insurance, and no representations are made "concerning the situation, value or risk of the property insured, and there is no fraudulent suppression of a material fact, or in case a printed slip is furnished describing the property in the most general terms, and the insurers issue the policy upon their own examination, they can not, after a loss, avail themselves of their own negligence in failing to make proper inquiries to defeat the policy."[18] This is sometimes carried so far as to practically destroy the rule of concealment and release the applicant from any duty except to answer questions. In the supreme court of the United States it was said:[19] "But the relation of the parties seems entirely changed if the insurer asks no information and the insured makes no representations. That is the chief novelty of this question, as hypothetically stated in the bill of exceptions. We think that the governing test is this: It must be presumed that the insurer has in person or by agent in such a case obtained all the information desired as to the premises insured, or ventures to take the risk without it, and that the insured, being asked nothing, has a right to presume that nothing on the risk is desired from him." This was recently followed in Washington,[20] where it appeared that no questions were asked and no representations made, but that the policy contained a provision requiring a full disclosure of certain matters. "There having been no written application," said the court, "in which questions were asked and answered concerning the *status* of the property, we think, under the authorities and as a question of right, that this condition which is injected into the policy among numerous other conditions, more or less technical, and hard to understand by the ordinary mind,

[18] Joyce Ins., § 1871; Pelzer Mfg. Co. v. Sun Fire Office, 36 S. C. 213, 15 S. E. 562 (1891); Gristock v. Royal Ins. Co., 87 Mich. 428, 49 N. W. 634 (1891); Western, etc., Pipe Lines v. Home Ins. Co., 145 Pa. St. 346, 22 Atl. 665 (1891). See Morotock Ins. Co. v. Rodefer, 92 Va. 747, 53 Am. St. 846 (1896).

[19] Clark v. Manufacturers' Ins. Co., 8 How. (U. S.) 235 (1850).

[20] Dooly v. Hanover Fire Ins. Co., 16 Wash. 155, 58 Am. St. 26 (1896), citing cases.

ought not to prevent a recovery in the absence of any misrepresentation on the part of the assured. The insured, as a matter of fact, ordinarily knows nothing about the policy until it is made out and returned to him after the payments for the same have been made to the agent at the time the contract was made, and the insurer, having failed to obtain the information, must be held to have done so at his peril."

§ 87. **Incomplete answers to inquiries.**—It is the duty of the applicant to answer fully and fairly all inquiries made with reference to the risk, but if such questions are not answered, or are incompletely answered, and the insurer, without further inquiry or investigation, issues the policy, he will be held to have waived his right to a more complete answer and elected to accept the risk with the information actually given. As said by Mr. Justice Gray:[21] "Where upon the face of the application a question appears to be not answered at all, or to be imperfectly answered, and the insurers issue a policy without further inquiry, they have waived the want or imperfection in the answer and rendered the omission to answer more fully immaterial." The English courts apply a contrary rule, and in commenting upon one of the leading cases,[22] Justice Gray says that so much of the language as "implies that an insurance company is not bound to look with the greatest attention at the answers of the applicant, to the great number of questions framed by the company or its agents, and that the intentional omission of the insured to answer a question put to him is a concealment which will void the policy issued without further inquiry, can hardly be reconciled with the uniform current of American authorities."

[21] Phœnix L. Ins. Co. v. Raddin, 120 U. S. 183 (1887). See also Higgins v. Phœnix M. L. Ins. Co., 74 N. Y. 9 (1878). In Parker v. Otsego County, etc., F. Ins. Co., 47 N. Y. App. Div. 204 (1900), the court said: "The failure to answer the question implied in the paragraph referred to, or answering it to a certain point and not completing the answer, was notice to the company simply that he declined to divulge, and the company might or might not issue to him the policy as it pleased on such facts as the company had." No breach of warranty can be based upon such an answer, as a breach of warranty must be based upon the affirmation of something not true: Dilleber v. Home L. Ins. Co., 69 N. Y. 256, 25 Am. Rep. 182 (1877); Penn Mut. L. Ins. Co. v. Wiler, 100 Ind. 92 (1884).

[22] London Assur. v. Mansel, L. R. 11 Ch. Div. 363 (1879).

§ 88. Answers calculated to mislead—Irresponsive answers.—Where the matters in question are open to general observation the applicant need not go into details, but may make general statements and leave the insurer to make other inquiries if he desires further information.[23] Although a failure to answer a question or an apparently incomplete answer will not avoid a policy issued without further inquiry, it is the duty of the applicant to give answers which are clear and specific, and not evasive and calculated to mislead.[24] Where a disclosure is required it should be full and complete, not partial, evasive or calculated to deceive, omitting matters of importance or materiality which, if disclosed, would make the answer full.[25] An irresponsive answer can not constitute a warranty, although it may be a representation, and thus invalidate the policy if material and also false.

"The answer to a material question may be in itself wholly immaterial and of no effect. An answer so irresponsive as to leave the fact of inquiry wholly undisclosed, the question unanswered, will not avoid the contract in the absence of fraud."[26]

§ 89. Time of concealment.—The concealment which will invalidate a contract of insurance refers to the time of making the contract, and not to the event itself. It can not be made to depend upon a subsequent event or upon facts learned by the insured after the risk has attached.[27]

§ 90. Materiality.—A fact is material within the meaning of this rule when it would influence the mind of the insurer in determining whether he would accept the risk, or the amount of the premium charged.[28] It has been said that only such facts as are material to the

[23] Fowler v. Ætna F. Ins. Co., 6 Cow. (N. Y.) 673, 16 Am. Dec. 460 (1827).

[24] Phœnix Ins. Co. v. Raddin, 120 U. S. 183 (1887); Moulor v. American L. Ins. Co., 111 U. S. 335 (1884). A mere check-mark placed after a question can not be deemed a negative answer when the same kind of marks appear after other questions not answered and deemed immaterial: Manhattan L. Ins. Co. v. Willis, 60 Fed. 236, 8 C. C. A. 594.

[25] American L. Ins. Co. v. Mahone, 56 Miss. 180 (1878). See Sladden v. New York L. Ins. Co., 86 Fed. 102, 29 C. C. A. 596 (1898).

[26] Perine v. Grand Lodge, 51 Minn. 224, 53 N. W. 367 (1892).

[27] Lynch v. Dunsford, 14 East 494 (1811).

[28] Daniels v. Hudson River F. Ins. Co., 12 Cush. (Mass.) 416, 59 Am. Dec. 192 (1853); Clark v. Union Mut. F. Ins. Co., 40 N. H. 333, 77 Am. Dec. 721 (1860); Waterbury v.

risk may be availed of; but the better rule is that any fact, the knowledge or ignorance of which would materially influence the judgment of the underwriter in making the contract or in determining the premium, is material, and, subject to the limitations already stated, should be disclosed.[29] Matters with reference to which inquiry has been made are always treated as material. In other cases the question of materiality is for the jury to determine.[30]

§ 91. **Concealment through inadvertence or negligence.**—While the decisions are not uniform, there is high authority for the view that under modern conditions the concealment of a material fact through inadvertence or mistake, and without fraudulent intent, will not invalidate a contract of insurance.[31] This tendency also appears by the enactment of statutes providing that false representations shall not invalidate the contract unless they increase the risk or are fraudulently made. We have found that the concealment which will authorize the rescinding of a contract of insurance is not necessarily fraudulent,[32] and there are many cases which hold that a false statement of a material fact is sufficient to avoid a policy written on the faith thereof, although it was made through inadvertence or mistake.[33]

Dakota F. & M. Ins. Co., 6 Dak. 468, 43 N. W. 697 (1889).

[29] Boggs v. American Ins. Co., 30 Mo. 63 (1860).

[30] Penn Mut. L. Ins. Co. v. Mechanics', etc., Co., 19 C. C. A. 286, 305 (1896) [disapproving statement in Provident, etc., Soc. v. Llewellyn, 7 C. C. A. 579 (1893), to the effect that the materiality of insured's having had delirium tremens is a matter of law for the court in any case where inquiry is not foreclosed by express or implied stipulations]; Fidelity & Cas. Co. v. Alpert, 14 C. C. A. 474, 67 Fed. 460 (1895). In Reynolds v. Atlas Acc. Ins. Co., 69 Minn. 93, the question of materiality was taken from the jury and determined as a question of law.

[31] See § 82, *supra;* Penn Mut. L. Ins. Co. v. Mechanics', etc., Co., 72 Fed. 413, 19 C. C. A. 286 (1896).

[32] If the concealment of a material fact is intentional, it is a case of actual fraud and avoids the contract: Daniels v. Hudson River F. Ins. Co., 12 Cush. (Mass.) 416, 59 Am. Dec. 192 (1853). See § 85, *supra.*

[33] Carpenter v. American Ins. Co., 1 Story (C. C.) 57 (1839). A party is not excused from the consequences of concealment of material facts by the mere fact that it was due to his ignorance or mistake. He must disclose facts not only of which he has actual knowledge, but those of which the law requires him to have knowledge. Hence, if the fact is one which comes within the scope of this rule, and is not disclosed to the insurer, the policy can not be enforced, although the failure to disclose it was due to his negligence or mistake, or was a

The logical rule, that which is consistent with the doctrine upon which the law of concealment rests—that of an implied condition,—is that even an innocent non-disclosure of a material fact will vitiate the policy unless there are specific inquiries under circumstances from which it will be presumed that the insured has waived further information.

§ 92. **Concealment or misrepresentation by agent.**—Every principle of good faith and fair dealing forbids even an innocent principal from taking advantage of the fraud of his agent. An agent for effecting insurance must, therefore, be held to bind his principal by the consequences of his misrepresentation or concealment.[34] The same principle requires that the knowledge of the agent acquired in the course of the transaction shall be treated as the knowledge of the principal.[35] This rule, with its limitations, is well illustrated by certain English cases dealing with marine insurance. In an early case[36] an agent of the insured was employed to ship a cargo of oats, and to communicate the fact of shipment to another agent, who was to effect an insurance on the cargo. The former neglected to notify the latter of the loss of the ship, and the insurance was held invalidated.

Ashhurst, J., said: "On general principles of policy the act of the agent ought to bind the principal, because it must be taken for granted that the principal knows whatever the agent knows; and there is no hardship on the plaintiff, for, if the fact had been known the policy could not have been effected."

In another case[37] it appeared that the master did not notify the owner that the ship had been lost; and the owner, in ignorance of the fact, effected an insurance on the ship by a policy "lost or not lost." It was held that the captain was bound to communicate the fact to the owner and that there could be no recovery on the policy,

mere accident: Weigle v. Cascade F. & M. Ins. Co., 12 Wash. 449, 41 Pac. 53 (1895).

[34] National L. Ins. Co. v. Minch, 53 N. Y. 144 (1873).

[35] Clement v. Phenix Ins. Co., 6 Blatchf. (C. C.) 481 (1869).

[36] Fitzherbert v. Mather, 1 Term R. 12 (1785).

[37] Gladstone v. King, 1 Maule & S. 35 (1813). The loss resulted from the fact thus concealed. The policy was not void, as the insured was allowed to recover back the premium. See comments on this case in Stribley v. Imperial Mar. Ins. Co., L. R. 1 Q. B. Div. 507 (1876). The case is criticised in Blackburn v. Vigors, L. R. 12 App. Cas. 531 (1887).

although there was no fraud. In a case where it appeared that at the time of the insurance the agent of the owner knew that the ship had been lost, the court said:[38] "The question arises whether the plaintiff, the assured, is so far affected by the knowledge of the agent of the loss of the vessel or damage to the cargoes that the fraud thus committed on the underwriters through the intentional concealment of the agent, though innocently committed, so far as the plaintiff is concerned, will afford a defense to the underwriter on a claim to enforce the policy." Chief Justice Cockburn said that "if an agent whose duty it is, in the ordinary course of business, to communicate information to his principal as to the state of the ship or cargo, omits to discharge such duty, or the owner, in the absence of information as to any fact material to be communicated to the underwriter, effects an insurance, such insurance will be void, on the ground of concealment or misrepresentation. The insurer is entitled to assume as the basis of the contract between him and the assured that the latter will communicate to him every material fact of which the assured has or in the ordinary course of business ought to have knowledge; and that the latter will take the necessary measures, by the employment of competent and honest agents, to obtain, through the ordinary channels of intelligence in use in the commercial world, all due information as to the subject-matter of the insurance. This condition is not complied with where, by the fraud or negligence of the agent, the party proposing the insurance is kept in ignorance of a material fact which ought to have been made known to the underwriter, and through such ignorance fails to disclose it."

§ 93. **Knowledge of the agent, continued.**—In a well-known case[39] it appeared that the owner of an overdue vessel instructed A to procure insurance, but he was unable to do so and so informed the owner. The same instructions were then given to B, with the same results. Another agent then secured the insurance. The vessel had been already lost, and the fact was known to B while he was attempting to secure the insurance. He did not communicate the fact to the owner or to C, and both were ignorant of the loss when the insurance was effected. The court of appeals held that there could be no recovery upon the policy, as the knowledge of the agent B must be imputed to

[38] Proudfoot v. Montefiore, L. R. 2 Q. B. 511 (1867).

[39] Blackburn v. Vigors, L. R. 17 Q. B. D. 553, 55 L. J. Q. B. (N. S.) 347 (1886).

the owner. The court below had ordered judgment for the plaintiff on the theory that as B, who had acquired the knowledge, was not the agent through whom the insurance was effected, his knowledge could not be imputed to the owner. This view was adopted by the master of the rolls in the court of appeals, who said: "I am prepared to decide this case upon the old, simple, recognized and easily justified rule that a contract of insurance is rendered void by an innocent misrepresentation or concealment of a material fact known to the assured, or to an agent of his, by or through whom the contract is made, and which fact the underwriter neither knows nor is bound to know; but is not rendered abortive by the misrepresentation or concealment of any other person or agent, whether innocent or fraudulent."

The majority of the court held that it was the duty of the agent who acquired the information to communicate it to his principal. Lord Justice Lindley said: "It appears to me to be established that in order to prevent fraud and willful ignorance on the part of persons effecting insurance, no policy can be enforced by an assured who has been deliberately kept in ignorance of material facts by some one whose moral, if not legal, duty it was to inform him of them; and he has been kept in such ignorance purposely in order that he might be able to effect the insurance without disclosing these facts. * * * It is a condition of the contract that there is no misrepresentation or concealment either by the assured or by any one who ought, as a matter of business or fair dealing, to have stated or disclosed the facts to him or to the underwriter for him."

But the house of lords reversed this decision, and permitted the plaintiff to recover.[40] Lord Watson said that "the responsibility of an innocent insured for the non-communication of facts which happen to be within the private knowledge of persons whom he merely employs to obtain an insurance upon a particular risk ought not to be carried beyond the person who actually makes the contract on his behalf. There is no authority whatever for enlarging his responsibility beyond that limit, unless it is to be found in the decisions which relate to captains and ship agents; and these do not appear to me to have any analogy to the case of agents employed to effect a policy. There is a material difference in the relations of these two classes of agents to their employers. The one class is specially employed for the purpose of communicating to him the very facts which

[40] Blackburn v. Vigors, L. R. 12 App. Cas. 531 (1887).

the law requires him to divulge to his insurer; the other is employed, not to procure or furnish information concerning the ship, but to effect an insurance. * * * It can not be reasonably suggested that the insurer relies to any extent upon the private information possessed by persons of whose existence he presumably knows nothing."

Lord Macnaughton said that it would "be a dangerous extension of the doctrine of constructive notice to hold that persons who are themselves absolutely innocent of any concealment or misrepresentation, and who have not willfully shut their eyes or closed their ears to any means of information, are to be affected with the knowledge of matters which other persons may be morally, though not legally, bound to communicate to them."

A distinction is here made between an agent to insure and an agent as the master of a ship. Mr. Justice Story held that when the owner, at the time of procuring the insurance, had no knowledge of the loss, but acted with entire good faith, he was not precluded from recovering, and that the policy was not rendered void by the omission of the master to communicate intelligence of the loss, although such omission was willful and fraudulent.[41]

[41] Ruggles v. General Interest Ins. Co., 4 Mason (C. C.) 74 (1825).

CHAPTER VI.

REPRESENTATIONS AND WARRANTIES.

§ 100. **Statutory modifications.**—The importance of technical warranties has been considerably diminished by the enactment of statutes that require them to be construed for all practical purposes as though they were common-law representations. Thus, in a number of states it is provided that no oral or written misrepresentation made in the negotiation of a contract or policy of insurance by the insured, or in his behalf, shall be deemed material or defeat or render void the policy or prevent its attaching unless such representation is made with actual intent to deceive, or unless such misrepresentation increases the risk of loss. Although such statutes in terms refer only to misrepresentations, they apply to all contracts of insurance, and to warranties as well as representations.[1]

[1] See § 119, *infra.*

§ 101. **Representations—Definition.**—A statement made by the applicant for insurance pending the negotiations relative to some fact having reference thereto, and upon the faith of which the contract is entered into, is called a representation. It may be verbal or written, and is made before the issuance of the policy with reference to some fact which, by apparently diminishing the risk, may tend to induce the insurer to more readily assume the risk, or to assume it at a lesser rate of premium. Such representations are not, strictly speaking, a part of the contract of insurance or of the essence of it, but are something collateral or preliminary thereto or in the nature of an inducement.[2]

§ 102. **Warranties distinguished from representations.**—When a representation made by an applicant for insurance is carried into the contract and made a part thereof, it becomes a warranty, and the question of its materiality is thus settled by the contract of the parties. A warranty at common law is defined as a stipulation or statement inserted or referred to in, and made a part of the insurance contract, upon the truth or performance of which the validity of the contract depends.[3] A representation is never a part of the contract of insurance, while a warranty must be inserted in the written contract in such a manner as to make it a part thereof.[4] It may be written upon the margin of the policy,[5] but a mere reference therein to another paper, unless such paper is referred to and made a part of the policy, is not sufficient.[6]

[2] Alabama Gold L. Ins. Co. v. Johnston, 80 Ala. 467 (1886); Pawson v. Watson, 2 Cowp. 785, 13 Eng. Rul. Cas. 540 (1778). Duer (Vol. 2 (ed. 1846), p. 644) claims that a positive representation is not collateral to but a part of the contract. In line with this view is Ellis Insurance 29.

[3] Ripley v. Ætna Ins. Co., 30 N. Y. 136 (1864).

[4] Lord Mansfield in Pawson v. Watson, 2 Cowp. 785, 13 Eng. Rul. Cas. 540 (1778); Wheaton v. North British, etc., Ins. Co., 76 Cal. 415, 9 Am. St. 216 (1888); Standard L. & Acc. Ins. Co. v. Martin, 133 Ind. 376, 33 N. E. 105 (1892). As to what language amounts to a warranty, see Daniels v. Hudson River, etc., Ins. Co., 12 Cush. (Mass.) 416, 59 Am. Dec. 192 (1853).

[5] Patch v. Phœnix, etc., Ins. Co., 44 Vt. 481 (1872); McLaughlin v. Atlantic Mut. Ins. Co., 57 Me. 170 (1869).

[6] Houghton v. Manufacturers', etc., Ins. Co., 8 Metc. (Mass.) 114 (1844); Ætna Ins. Co. v. Grube, 6 Minn. 82, Gil. 32 (1861). As to meaning of "indorsed," etc., see Reynolds v. Atlas, etc., Ins. Co., 69 Minn. 93, 71 N. W. 831 (1897).

The supreme court of Minnesota, in an early case, thus stated the distinction between warranties and representations:[7] "'An express warranty in the law of insurance is a stipulation inserted in writing upon the face of the policy, on the literal truth or fulfillment of which the validity of the entire contract depends. The stipulation is considered to be on the face of the policy, although it may be written in the margin or transversely, or on a subjoined paper referred to in the policy.'[7a] A representation, as distinguished from a warranty in the law of insurance, is 'a verbal or written statement made by the assured to the underwriter, before the subscription of the policy, as to the existence of some fact or state of facts tending to induce the underwriter more readily to assume the risk by diminishing the estimate he would otherwise have formed of it.'[7b] In the law of insurance a warranty is always a part of the contract—a condition precedent upon the fulfillment of which its validity depends. A representation, on the other hand, is not a part of the contract, but is collateral to it.[8] The essential difference between a warranty and a representation is that in the former it must be literally fulfilled, or there is no contract, the parties having stipulated that the subject of the warranty is material and closed all inquiry concerning it; while in the latter, if the representation prove to be untrue, still, if it is not material to the risk, the contract is not avoided."[9]

§ 103. **Affirmative and promissory warranties.**—A warranty may be either affirmative or promissory, the former affirming the existence of certain facts at the time of the insurance, and the latter requiring the performance or the omission of certain things after the taking out of the insurance.[10] This is illustrated by a recent case in the circuit court of appeals.[11] A policy insuring against loss through

[7] Ætna Ins. Co. v. Grube, 6 Minn. 82, Gil. 32 (1861).

[7a] Quoting Angell Ins., § 140, note.

[7b] Quoting Angell Ins., § 147.

[8] Missouri, etc., Trust Co. v. German Nat'l Bank, 77 Fed 117, 23 C. C. A. 65 (1896).

[9] See Mutual Ben. L. Ins. Co. v. Robison, 58 Fed. 723, 7 C. C. A. 444, 22 L. R. A. 325 (1893); Cobb v. Covenant, etc., Ass'n, 153 Mass. 176, 25 Am. St. 619 (1891). In Glendale Woolen Co. v. Protection Ins. Co., 21 Conn. 19, 54 Am. Dec. 309 (1851), it was said: "The former precedes and is no part of the contract of insurance, and need to be only materially true; the latter is a part of the contract and policy, and must be exactly and literally fulfilled, or else the contract is broken and the policy becomes void."

[10] Blumer v. Phœnix Ins. Co., 45 Wis. 622 (1878).

[11] Hunt v. Fidelity, etc., Co., 99 Fed. 242, 30 C. C. A. 496 (1900).

the embezzlement of an agent was issued upon an application signed by the applicant which contained answers to questions relative to the subject-matter of the policy. These statements were, by the terms of the policy, "to constitute an essential part and form the basis of the contract." The declaration also stated that the answers were true to the best of the knowledge and belief of the assured, and were to be taken as the basis of the contract between the parties.

It was also stated that monthly comparisons were made of the money in the hands of the agent, with the accounts and vouchers. It was held that this was a warranty, and that the statement was not qualified by the statement that the answers were true "to the best of the knowledge and belief" of the applicant. Judge Wallace said: "This, at all events, is a promise that either at the New York office, or at its general office, or at some other place, the assured would attempt to make a monthly examination in order to ascertain whether the money in its agent's hands corresponded with the balance which should be there, according to his accounts. The promissory statement, having been made part of the contract between the parties, by the terms both of the policy and the declaration, was in effect a warranty, which the insured was bound to fulfill in substance and according to its meaning.[12] It is quite immaterial that the statement is not called a warranty. It is a stipulation embodied in the contract, by the words of the policy, for the performance of future acts, and as such is an express warranty."

§ 104. **Effect of breach of warranty.**—At common law the effect of a warranty is to make void the policy if the statements are not literally true, or if the stipulations are not fully observed without reference to their materiality or the willfulness of the non-observance or cause of the loss.[13] The rule was thus stated by Chief Justice Shaw:[14] "If any statement of fact, however unimportant it may

[12] Jeffries v. Life Ins. Co., 22 Wall. (U. S.) 47, 53 (1874); Brady v. United L. Ins. Ass'n, 60 Fed. 727, 9 C. C. A. 252 (1894); Missouri, etc., Trust Co. v. German Nat'l Bank, 77 Fed. 117, 23 C. C. A. 65 (1896).

[13] Campbell v. New England, etc., Ins. Co., 98 Mass. 381 (1867); Cobb v. Covenant Mut. Ben. Ass'n, 153 Mass. 176, 10 L. R. A. 666 (1891); Price v. Phœnix Mut. Ins. Co., 17 Minn. 497, Gil. 473 (1871); Ætna L. Ins. Co. v. France, 91 U. S. 510 (1[illegible]). As to modifications by statute, see § 119, *infra*.

[14] Daniels v. Hudson River F. Ins. Co., 12 Cush. (Mass.) 416 (1853).

have been regarded by both parties to the contract, is a warranty, and it happens to be untrue, it avoids the policy; if it be construed a representation, and is untrue, it does not avoid the contract if not willful, or if not material. To illustrate this: The application, in answer to an interrogatory, states, 'Ashes are taken up and removed in iron hods.' Whereas, it should turn out in evidence that ashes are removed and taken up in copper hods, perhaps a set recently obtained, and unknown to the owner. If this was a warranty, the policy is gone, but, if a representation, it would not, we presume, affect the policy, because not willful or designed to deceive; but more especially because it would be utterly immaterial, and would not have influenced the mind of either party in making the contract or fixing its terms."

§ 105. **Construction of statements in the application.**—The statements contained in the application for insurance will be regarded as representations unless they are in express terms made a part of the contract of insurance and warranted to be true. Where the application contains certain statements which are certified to be true, but are not referred to in the contract, they are considered as representations, and invalidate the contract only when false and material.[15]

§ 106. **Application made part of the policy.**—An insurance company, in taking risks upon lives or property, has the right to determine the conditions upon which it will issue a policy and to insist upon their literal fulfillment. When these conditions are expressed in, and made a part of the written contract, their materiality is not open to question. In such cases the intention of the parties is to be gathered from the terms of the contract. The statements of the insured may be thus incorporated as the conditions on which the insurance is undertaken, and when thus made the basis of the contract, if untrue, will render it invalid.[16] Statements made in the application are primarily representations unless made warranties by being incorporated into the contract. The modern practice, made compulsory by statute in some states,[16a] is to attach a copy of the application to the policy and to refer thereto by appropriate language in the

[15] Fidelity & Cas. Co. v. Alpert, 67 Fed. 460, 14 C. C. A. 474 (1895); McVey v. Grand Lodge, 53 N. J. L. 17, 20 Atl. 873 (1890).

[16] Standard, etc., Ins. Co. v. Martin, 133 Ind. 376 (1892).

[16a] See Corson v. Anchor, etc., Ins. Co. (Iowa), 85 N. W. 806 (1901).

policy. The two papers thereupon constitute the written agreement of insurance, and must be construed together as containing the conditions, clauses and stipulations upon which the insurance is made. This rule was applied where the application provided that the answers and statements in the application were warranted to be "full, complete and true," and if there not so, the policy issued thereon shall be "null and void," and that the answers are a part of the policy. In this case the application was not attached to the policy, but the policy contained a clause to the effect that, "in consideration of the answers, statements and agreements contained in the application for this policy of insurance, which are hereby made a part of this contract."[17] But a mere general reference in a policy to the application will not give its statements the effect of warranties.[18] Warranties will not be created by implication, and if it is the intention that statements shall be warranties, there must be no ambiguity or uncertainty in the language used to express such intention.[19] It has been held that a mere provision in a policy whereby the application is made a part of the policy is not sufficient to make its statements and representations warranties.[20]

§ 107. **Construction.**—The courts do not look with favor upon a strict technical warranty, and, while recognizing the right of the parties to say that matters immaterial in fact shall be regarded as material for the purpose of a particular contract, will not assume that such was their intention unless it is made clearly to appear by the terms of the contract.[21] The rules governing representations are

[17] Fidelity & Cas. Co. v. Alpert, 67 Fed. 460, 14 C. C. A. 474 (1895); Alabama Gold L. Ins. Co. v. Garner, 77 Ala. 215 (1885); National Bank v. Ins. Co., 95 U. S. 673 (1877).

[18] Jefferson Ins. Co. v. Cotheal, 7 Wend. (N. Y.) 72, 22 Am. Dec. 567 (1831).

[19] Moulor v. American L. Ins. Co., 111 U. S. 335 (1883); Supreme Council v. Brashears, 89 Md. 624, 73 Am. St. 244 (1899).

[20] Supreme Council v. Brashears, 89 Md. 624, 73 Am. St. 244 (1899). In this case the court said that the question of materiality as well as truth would be for the jury to determine, although specific inquiries had been made.

[21] Daniels v. Hudson River F. Ins. Co., 12 Cush. (Mass.) 416 (1853); National Bank v. Insurance Co., 95 U. S. 673 (1877); Commonwealth Mut. F. Ins. Co. v. Huntzinger, 98 Pa. St. 41 (1881); Fitch v. American, etc., Ins. Co., 59 N. Y. 557, 17 Am. Rep. 372 (1875). For a statement of the rules of construction of insurance contracts, see Alabama G. L. Ins. Co. v. Johnston, 80 Ala. 467, 2 So. 125 (1886).

fair and equitable, and in all cases of ambiguity it will be presumed that the parties intended that the questions of good faith and materiality shall be determined as questions of fact. Even stipulations in the policy in the form of a warranty are often given no greater effect than representations. A technical representation can not be a part of the contract, but there is no rule of law which will prevent the parties from inserting statements in the contract which shall be given the force and effect only of a representation.[22] The mere use of the word warranty with reference to the statements made by the insured is not conclusive that such statements are to be treated as warranties in the strict legal sense. It is said by the supreme court of Michigan:[23] "In construing warranties contained in policies of insurance it may be asserted that the prime object to be reached is the intention of the parties, and if that can be found, such intention must control. The rules in the interpretation of such warranties are the same as those which apply to the interpretation of other mercantile contracts. All written instruments, where the provisions are clear and unambiguous, are entitled to a literal interpretation; and wherever in a contract of insurance there is a clear breach of a warranty

[22] National Bank v. Union Ins. Co., 88 Cal. 497, 26 Pac. 509 (1891).

[23] Hoose v. Prescott Ins. Co., 84 Mich. 309, 47 N. W. 587 (1890). Warranties are never created by construction: Jefferson Ins. Co. v. Cotheal, 7 Wend. (N. Y.) 72, 22 Am. Dec. 571 (1831); Duncan v. Sun Fire Ins. Co., 6 Wend. (N. Y.) 494 (1831). In McGannon v. Michigan, etc., Ins. Co. (Mich.), 87 N. W. 61 (1901), it was said: "On the part of the plaintiff it is said the agreement to keep a watchman is a promissory agreement, and not a warranty, the literal observance of which is necessary to keep the policy in force, inasmuch as there is no express provision in the policy that a failure to keep a watchman at all times shall make the policy void. The authorities upon these several propositions are very conflicting. The old rule as to warranties fully sustains the contention of counsel for defendant, but there has been a tendency of late years to hold that the substantial fulfillment of an agreement like that contained in the application is sufficient. In May Ins., § 156, it is said, after the language before quoted: 'A learned judge and author declares it to be unfortunate that so strict a rule has been established, and intimates—what is no doubt entirely true—that courts are not at all inclined to go beyond the precedents to support a warranty. There are even authorities to the effect that in dealing with warranties common sense is not to be lost sight of, and that the fair, practical intent of the parties is to be sought, not the hair-splitting of a college of wit crackers, and that substantial fulfillment of a warranty is enough.' "

contained therein, however immaterial it may be, the policy will be avoided. It may be said that the warranties contained in the policy are somewhat different from representations made, in this, that while a representation may be satisfied with a substantial or even an equitable compliance, a warranty requires a strict and literal fulfillment." The language must be given a reasonable construction in view of the purposes of the provision under consideration.[24] A statement by the applicant, in answer to a question that he understands that untrue answers will render the contract void, will not control the construction. "The statements expressing his understanding of what will be the effect of the insurance are statements, not of fact, but of law, and can not control the legal construction of the policy afterwards issued and accepted."[25]

§ 108. **Oral representations.**—A representation may be either verbal or written, but where a written application is made, it will be presumed to contain all representations which were made as an inducement to the contract.[26]

§ 108a. **Mistake—Good faith answer.**—There are a number of cases which hold that the element of good faith enters so far into the construction of statements made in the form of warranties that it is enough if they are substantially true. In a well-known case in the supreme court of the United States the insured had warranted "that the above are fair and true answers." In fact, the application contained the untrue statement that the applicant had not been afflicted with a certain disease. The court, Mr. Justice Harlan, said:[27] "The entire argument on behalf of the company proceeds upon the too literal interpretation of those clauses in the policy and application which declare the contract null and void if the answers of the insured

[24] See note to Fowler v. Ætna F. Ins. Co., 6 Cow. (N. Y.) 673, 16 Am. Dec. 466 (1827).

[25] Accident Ins. Co. v. Crandal, 120 U. S. 527 (1886).

[26] Where a written application is made the company has no right to rely upon a verbal representation made to its agent: Dolliver v. St. Joseph, etc., Ins. Co., 131 Mass. 39 (1880). Previous verbal statements merged in the policy: Ins. Co. v. Mowry, 96 U. S. 544 (1887). Executory verbal contract made at the time written policy is issued with reference to the future can not be shown: Hartford F. Ins. Co. v. Davenport, 37 Mich. 609 (1877). But see McMaster v. New York L. Ins. Co. (U. S.), 22 Sup. Ct. 10 (1901).

[27] Moulor v. American L. Ins. Co., 111 U. S. 335 (1883).

to the questions propounded to him were in any respect untrue. What was meant by 'true' and 'untrue' answers? In one sense, that only is true which is conformable with the actual state of things. In that sense a statement is untrue which does not express things exactly as they are, but in another and broader sense the word 'true' is often used as a synonym of honest, sincere, not fraudulent. Looking at all the clauses in the application in connection with the policy, it is reasonably clear—certainly the contrary can not be confidently asserted—that what the company required of the applicant as a condition precedent to any binding contract was that he would observe the utmost good faith toward it, and to make fair, direct and honest answers to all questions without evasion or fraud and without suppression, misrepresentation or concealment of facts with which the company ought to be made acquainted, and that by so doing, and only by so doing, would he be deemed to have made 'fair and true' answers." The effect of this reasoning was to make the answers to the questions merely representations.

In a recent Illinois case[28] it was held that a statement by an applicant for insurance that none of his brothers were dead will not, although false, avoid the policy, unless he knew it to be false, under a policy warranting the statements to be true, and that they shall form the basis of any contract entered into.

In commenting upon the Moulor case, the court said: "In that case the untrue statements were held to be representations, and not warranties, and we think, on the same reasoning, the answer herein to the question should be so held, in the absence of proof by the company of fraud or intentional misstatement on the part of the insured. The policy was not rendered invalid merely because the answer proved to be false."

§ 109. **Statement of expectation or belief.**—A statement of expectation or belief, unless fraudulently made, will not avoid a policy.[29] Where the statement amounts merely to an expression of opinion or

[28] Globe, etc., Ins. Ass'n v. Wagner, 188 Ill. 133, 58 N. E. 970 (1901). To the same effect, see Fidelity, etc., Ass'n v. Jeffords, 107 Fed. 402, 46 C. C. A. 377 (1901).

[29] "The mere statement of belief or expectation, which is not borne out by the event, is not, unless made *mala fide* by a person who entertains no such belief or expectation, a representation so as to avoid the policy; and a statement as to a future event made by a person who has obviously no control over the event is regarded as a mere statement of an expectation." Rule as stated in 13 Eng. Rul. Cas. 531.

belief, and there is no actual fraud in inducing the insurer to enter into the contract, it will not avoid the policy. But there is a clear distinction between a case of this character and one where the insured intentionally and fraudulently states, as a matter of expectation or belief, that which he then knows to be actually untrue,[30] or where the facts within his knowledge show to him that it is impossible that the matter stated by him as one of belief or expectation can exist or happen.[31] Here the intent to deceive the insurer is apparent, and there is actual fraud, which vitiates the contract where the insurer is misled or deceived in acting to his injury when he otherwise would not have so acted.[32] A positive statement will bind the applicant, although it was based upon information obtained from other parties. If he does not wish to vouch for the truth of a statement it is his duty to make it in a qualified form, and disclose the fact that the information is derived from others, and that he does not vouch for its accuracy.[33]

§ 110. Affirmative and promissory representations—Continuing warranties.—A representation is ordinarily of an existing fact. If an existing condition is required by the insurer to be continued during the life of the contract he should insert it in the contract and make it a condition in the nature of a warranty. But a mere statement that a certain condition exists at the time a representation is made—as that smoking is not allowed on the premises—is not a stipulation that it will continue to exist.[34] So a representation by an applicant for accident insurance that he is a switchman does not require him to remain in that occupation when the policy contains no provision against a change of occupation.[35] A representation that a force pump and an abundance of water exist for the extinguishing of fire is not an agreement that the pump shall be kept in good condition for such use.[36] So, a statement in an application that a house is occupied is descriptive

[30] Hunt v. Fidelity & Cas. Co., 39 C. C. A. 496 (1900); Bryant v. Ocean Ins. Co., 22 Pick. (Mass.) 200 (1839).

[31] Barber v. Fletcher, 1 Doug. 305, 13 Eng. Rul. Cas. 532 (1779); Bowden v. Vaughan, 10 East 415, 10 Rev. Rep. 340, 13 Eng. Rul. Cas. 533 (1808); Anderson v. Pacific F. & M. Ins. Co., L. R. 7 C. P. 65 (1872).

[32] Joyce Ins., § 1904; Herrick v. Union, etc., Ins. Co., 48 Me. 558, 77 Am. Dec. 244 (1860).

[33] Tidmarsh v. Washington, etc., Ins. Co., 4 Mason (C. C.) 439 (1827), Story, J.; Williams v. Delafield, 2 Caines (N. Y.) 329 (1805).

[34] Hosford v. Germania F. Ins. Co., 127 U. S. 399 (1888).

[35] Provident L. Ins. Co. v. Fennell, 49 Ill. 180 (1868).

[36] Gilliat v. Pawtucket, etc., Ins.

only and is not a warranty that it will be occupied during the existence of the risk.[37] A representation that the property insured is a private dwelling-house is not a promise that it will not be used for other purposes.[38] A statement that a building would be occupied by a tenant is a mere statement of expectation.[39] The words, "no stoves used," do not create a continuing warranty that stoves will not be used in the future.[40] So, "ashes are thrown out," is not a continuing warranty.[41] But a statement that a watchman is kept on the premises when a mill is not in operation has been construed as a promise that the practice will be continued.[42] But a policy may contain an express covenant as to the future, the breach of which will invalidate the contract.[43] Where an applicant for life insurance stated that he had not or would not practice any pernicious habits tending to shorten life, but there was no stipulation that a violation of this statement would void the policy, it was held to apply only to an existing state of facts, and that the statement as to the future was a mere expression of intention.[44] The correctness of this decision is very doubtful, and a contrary decision was reached by the federal court in considering the same contract.

§ 111. **Oral promissory representations.**—The distinction between affirmative and promissory representations is generally recognized by the courts and text writers. The question has been much discussed and the authorities are somewhat conflicting.

Co., 8 R. I. 282, 91 Am. Dec. 229 (1866).

[37] Cumberland Valley, etc., Protection Co. v. Douglas, 58 Pa. St. 419, 98 Am. Dec. 298 (1868).

[38] Rafferty v. New Brunswick F. Ins. Co., 3 Harr. (N. J. L.) 480, 38 Am. Dec. 525 (1842).

[39] Herrick v. Union M. F. Ins. Co., 48 Me. 558, 77 Am. Dec. 244 (1860).

[40] Aurora F. Ins. Co. v. Eddy, 55 Ill. 213 (1870).

[41] Hartford Prot. Ins. Co. v. Harmer, 2 Ohio St. 452, 59 Am. Dec. 684 (1853).

[42] Blumer v. Phœnix Ins. Co., 45 Wis. 622 (1878). See McGannon v. Michigan, etc., Ins. Co. (Mich.), 87 N. W. 61, 54 L. R. A. 739 (1901); Hart v. Niagara, etc., Ins. Co. (Wash.), 27 L. R. A. 86.

[43] Houghton v. Manufacturers', etc., Ins. Co., 8 Met. (Mass.) 114 (1844).

[44] Knecht v. Mutual L. Ins. Co., 90 Pa. St. 118, 35 Am. Rep. 641 (1871). The policy contained a provision to the effect that it should be void if any of the statements and declarations made in the application, upon the faith of which the policy was issued, should be found in any respect untrue. But see *contra*, on the same policy, Schultz v. Mutual L. Ins. Co., 6 Fed. 672 (1881).

An ordinary representation is not a part of the contract between the insurer and the insured, and if a statement with reference to a future fact is to have force it should be inserted in the policy, or in the application and referred to in the policy, in such a manner as to make it a part thereof. To permit an oral promissory representation, made before the contract is closed, to be received for the purpose of invalidating the contract after it has gone into effect, violates well-established rules of evidence. Chancellor Walworth, after an exhaustive review of the authorities, arrived at the conclusion that there could be no such thing as a promissory *warranty*.[45] The federal court held[46] "that an actual promise, if oral, can not be given in evidence to defeat a policy which has once attached. * * * I have seen no case which holds that an oral statement of a fact could be construed into a continuing warranty or promise when the contract is in writing." Mr. Justice Gray, in a leading Massachusetts case,[47] makes a clear distinction between oral and written promises, and holds that the latter are binding, but that a breach of an oral promise will not avoid the policy unless fraud is shown. The learned judge says: "The word representation has not always been confined in

[45] Alston v. Mechanics', etc., Ins. Co., 4 Hill (N. Y.) 329 (1842). See note to Bowden v. Vaughan, 13 Eng. Rul. Cas. 534 (1808).

[46] In Albion Lead Works v. Williamsburg City F. Ins. Co., 2 Fed. 479 (1880), the court said: "It is impossible to reconcile the decisions upon this question of a continuing warranty. When an underwriter asks about the particulars of a risk he probably takes it for granted that things will continue as they are, but when the courts are asked to construe this impression into a covenant, and make words in the present tense operate as a stipulation for the future, there is a difficulty, and the authorities are doubtful and divided. The result, as far as I can gather it, is that when the fact appears to the court to be a very important one, such as the employment of a watchman, a majority of them have said that this ought to be considered a part of a continuing agreement. When the fact does not appear to be so important, as that a dwelling-house is occupied, or that a clerk sleeps in the store, it is not of that character." As said by May: "It is obvious that the test here given is no test at all, and it is to be regretted that there has been any departure from the salutary rule that the courts will not set up warranties where the parties have not clearly made them. It would have been fortunate if they had found more difficulty converting impressions or expectations into covenants."

[47] Kimball v. Ætna Ins. Co., 9 Allen (Mass.) 540, 85 Am. Dec. 786 (1865).

use to representations of facts existing at the time of making the policy, but has been sometimes extended to statements made by the assured concerning what is to happen during the term of the insurance; in other words, not to the present, but to the future; not to facts which any human being knows or can know, but to matters of expectation or belief, or of promise or contract. Such statements, when not expressed in the form of a distinct and explicit warranty which must be strictly complied with, are sometimes called promissory representations, to distinguish them from those relating to facts or affirmative representations; and these words express the distinction: the one is an affirmation of a fact existing when the contract begins; the other is a promise to be performed after the contract has come into existence. Falsehood in the affirmation prevents the contract from ever having any life; breach of the promise could only bring it to a premature end. A promissory representation may be inserted in the policy itself; or it may be in the form of a written application for the insurance, referred to in the policy in such a manner as to make it in law a part thereof; and in either case the whole instrument must be construed together. But this written instrument is the expression and the only evidence of the duties, obligations and promises to be performed by each party while the insurance continues. To make the continuance or termination of a written contract which has once taken effect dependent upon the performance or breach of an oral agreement would be to violate a fundamental rule of evidence. A representation that a fact now exists may be either oral or written, for, if it does not exist, there is nothing to which the contract can apply. But an oral representation as to a future fact, honestly made, can have no effect; for, if it is a mere statement of an expectation, subsequent disappointment will not prove that it was untrue; and if it is a mere promise that a certain state of facts shall exist, or continue during the term of the policy, it ought to be embodied in the written contract."[48]

§ 112. **Conclusion.**—The rule deducible from the authorities is that while promissory representations are recognized and enforced,[49]

[48] As to promissory representations, see further: Prudential Assur. Co. v. Ætna L. Ins. Co., 23 Blatch. (C. C.) 223, 23 Fed. 438 (1885); Houghton v. Manufacturers', etc., Ins. Co., 8 Met. (Mass.) 120 (1844); Prudential Assur. Co. v. Ætna L. Ins. Co., 52 Conn. 576 (1885); Wytheville Ins. Co. v. Stultz, 87 Va. 629, 13 S. E. 77 (1891).

[49] Straker v. Phenix Ins. Co., 101 Wis. 413, 77 N. W. 752 (1898); Phil-

it is only those that are reduced to writing and made a part of the contract in the nature of a warranty that are available.[50] An oral promissory representation made in good faith, without an intention to mislead or deceive, can not be shown for the purpose of destroying a written contract which has already attached. But when such promises are made in bad faith, with the intent to deceive and mislead the insurer, it will be given the same effect as an affirmative representation. The fraud, and not the agreement, is the basis of the right of the insurer.

§ 113. **Misrepresentation by agent.**—An agent who represents his principal in a certain transaction of course binds the principal by his statements in relation thereto. The question always is as to the character of the agency.[51]

lips Ins. (3d ed.), § 553; Duer Mar. Ins. (ed. 1845) 647, 749; Joyce Ins., § 1917, note.

[50] The California Code (section 2574) provides that "a representation as to the future is to be deemed a promise, unless it appears that it was merely a statement of a belief or expectation," and that "a representation can not be allowed to qualify an express provision of a contract of insurance, but it may qualify an implied provision." Mr. May (Ins., § 1820) says: "Upon this distinction follows the important consequence that while a material falsity of an affirmative representation will be a complete defense to an action on a policy of insurance, the material falsity of an oral promissory representation without fraud is no defense whatever. And the reason of the distinction is this: the falsehood of the representation of a material fact misleads the insured into a contract which he does not intend to make. He may therefore set up the fact that he was misled or deceived as proof that no agreement was ever made since there was no concurrence of consent upon the same facts. But an oral promissory representation being an agreement prior in date to the actual contract of insurance, and in its nature such that it can not be performed until after the contract of insurance had taken effect, can not be set up to defeat the latter contract; for this would be to violate a fundamental rule of evidence, and to make the continuance or maintenance of a written contract dependent upon the performance or breach of an earlier oral agreement. If the oral agreement be made *mala fide*, and with the intention to mislead and deceive, the fraud will have the same effect as the material falsity of an affirmative representation. But if made *bona fide*, and without the intention to deceive, it can not be set up to avoid the contract. Only those promissory representations are available for such a purpose which are reduced to writing and made a part of the contract, thus becoming, substantially, if not formally, warranties."

[51] See § 92, *supra;* Brown v. Metropolitan L. Ins. Co., 65 Mich 306, 8

§ 114. Effect of misrepresentation.—A representation, if false and material, avoids the policy. It is immaterial whether it was fraudulently or innocently made.[52] It will be observed that a representation, to avoid the contract, must be both false and material.[53] If the fact is actually material and untrue, it is not necessary to show that the representation was fraudulent,[54] but where actual fraud exists—that is, where it clearly appears that the insurer was induced to issue the policy by the intentionally false statements of the insured—the materiality is conclusively presumed and need not be proven.[55] Thus, where the applicant fraudulently represented that he was the moneyed man of the firm, and thereby induced the insurer to take the risk, the policy was avoided, although the fact was immaterial to the risk.[56] But there are cases that hold that undesigned and unintentional misstatements will not avoid the policy unless made under circumstances of gross negligence.[57]

§ 115. Substantial truth required.—Where a representation is made with reference to a material fact it must be substantially true or it will avoid the contract. In this respect representations are construed less strictly than warranties.[58]

§ 116. Test of materiality.—The materiality of a representation is determined by the same rules which we found applicable in the case of concealment.[59] If the representation is of such a nature as would probably induce the insurer, being governed by the rules which

Am. St. 356 (1887); Grattan v. Metropolitan L. Ins. Co., 80 N. Y. 293, 36 Am. St. 617 (1880).

[52] Armour v. Transatlantic F. Ins. Co., 90 N. Y. 450 (1882); Provident Sav., etc., Soc. v. Llewellyn, 58 Fed. 940, 7 C. C. A. 579 (1893).

[53] Clason v. Smith, 3 Wash. (C. C.) 156 (1812); Vivar v. Supreme Lodge, 52 N. J. L. 455, 20 Atl. 36 (1890).

[54] Lewis v. Eagle Ins. Co., 10 Gray (Mass.) 508 (1858). See Wood v. Firemen's F. Ins. Co., 126 Mass. 316 (1879).

[55] Pawson v. Watson, 2 Cowp. 785, 13 Eng. Rul. Cas. 540 (1778).

[56] Valton v. National, etc., Assur. Co., 20 N. Y. 32 (1859).

[57] See Penn Mut. L. Ins. Co. v. Mechanics', etc., Co., 72 Fed. 413, 19 C. C. A. 286 (1896); Columbia Ins. Co. v. Cooper, 50 Pa. St. 331 (1865).

[58] Phœnix L. Ins. Co. v. Raddin, 120 U. S. 183 (1887); Missouri, etc., Trust Co. v. German Nat. Bank, 77 Fed. 117, 40 U. S. App. 710 (1896).

[59] § 90, *supra*. See Civil Code Cal., § 2581.

ordinarily control intelligent, prudent underwriters, to take the risk, or to accept it at a lower premium than he otherwise would, it is material. The test is the probable effect which the statement might naturally and reasonably be expected to produce on the mind of the insurer,[60] and not the fact that it actually increased the risk.[61] But the parties may by express stipulation preclude inquiry into the question of materiality,[62] as where a representation is made in the form of an answer to a specific question. The parties may thus, unless restrained by statute, make material a fact which would otherwise be immaterial.[63] The question of materiality, when not thus determined, is for the jury.[64]

§ 117. **Materiality—Opinion of experts.**—The cases which deal with the question of the right of an expert to testify as to whether a certain fact is material or not are in a bewildering state of confusion. Judge Taft, after an elaborate review of the authorities, recently held that the question of materiality is always for the jury, unless the answers in the application are expressly made the basis of the contract; and even then, where the statute provides that innocent misrepresentations in matters not material to the risk shall constitute no defense; that by the weight of authority in this country an insurance expert can not be asked his opinion whether an undisclosed or mis-

[60] Columbia Ins. Co. v. Lawrence, 10 Pet. (U. S.) 507 (1836); Perine v. Grand Lodge, 51 Minn. 224 (1892); Waterbury v. Dakota F. & M. Ins. Co., 6 Dak. 468, 43 N. W. 697 (1889). If the circumstances show that the insurer did not rely upon the misrepresentation, and that it did not induce him to make the contract, it is immaterial: Flinn v. Headlam, 9 Barn. & C. 693 (1829).

[61] Valton v. National, etc., Assur. Co., 20 N. Y. 32 (1859).

[62] Stensgaard v. St. Paul, etc., Ins. Co., 50 Minn. 429 (1892); Cerys v. State Ins. Co., 71 Minn. 338 (1898). See language of Lord Chancellor Cranworth in Anderson v. Fitzgerald, 4 H. of L. Cas. 513 (1853).

[63] § 84, *supra;* Phœnix Life Ins. Co. v. Raddin, 120 U. S. 183 (1887); Miller v. Mut. Ben. L. Ins. Co., 31 Iowa 216 (1871). Under such circumstances the court must rule whether the matter is material, and the jury then determines its truth. Of course, the answer may be so irresponsive as to leave the question unanswered. In the absence of fraud, such an answer is immaterial: Perine v. Grand Lodge, 51 Minn. 224 (1892).

[64] § 90, *supra;* Caplis v. American F. Ins. Co., 60 Minn. 376, 62 N. W. 440 (1895); Manufacturers', etc., Ins. Co. v. Zeitinger, 168 Ill. 286, 61 Am. St. 105 (1897).

represented fact is or is not material to the risk; but he may be asked concerning the usages of insurance companies generally in respect to rejecting risks or charging a higher rate of premium when made aware of the fact in question.[65]

§ 118. **Burden of proof.**—The burden of proof to establish the materiality of the concealment or misrepresentation, as well as the fraudulent intent, where that is necessary, is upon the defendant.[66] This burden is not shifted where it is admitted that the insured made an untrue answer concerning other insurance, for if there is a presumption that his failure to mention it is intentional, there is also a presumption that a person does not make a fraudulent misstatement, and the question is for the jury upon all the evidence.[67] But the rule is generally held to be otherwise in case of a warranty, which is in the nature of a condition precedent. The plaintiff must aver and prove the strict performance of such conditions.[68] But this rule is said not to be applicable to "representations amounting to warranties which are contained in the application only." A defendant who relies upon such a warranty must allege it and assume the burden of proof. In one case Judge Wallace said:[69] "The rule requiring the performance of warranties to be averred and proved was engrafted into the law of insurance before it was customary for underwriters to inquire of the insured the full and detailed applications which are a feature of so much prominence in the modern contract, especially in the contract of life insurance. The policy is the evidence delivered to the insured of the contract of the insurer, and, ordinarily, of

[65] Penn Mut. L. Ins. Co. v. Mechanics', etc., Co., 72 Fed. 413, 19 C. C. A. 286, 38 L. R. A. 233 (1896).

[66] Penn Mut. L. Ins. Co. v. Mechanics', etc., Co., 72 Fed. 413, 19 C. C. A. 286 (1896); Piedmont, etc., Ins. Co. v. Ewing, 92 U. S. 377 (1875); Grangers' L. Ins. Co. v. Brown, 57 Miss. 308 (1879); Jones v. Brooklyn L. Ins. Co., 61 N. Y. 79 (1874).

[67] Penn Mut. L. Ins. Co. v. Mechanics', etc., Co., 72 Fed. 413, 19 C. C. A. 286 (1896).

[68] American Credit, etc., Co. v. Wood, 73 Fed. 81, 19 C. C. A. 264 (1896); McLoon v. Commercial Ins. Co., 100 Mass. 472 (1868). As to manner of pleading performance, see Hart v. National Masonic, etc., Ass'n, 105 Iowa 717, 75 N. W. 508 (1898). A waiver or estoppel can not be shown unless pleaded: McCoy v. Iowa State Ins. Co., 107 Iowa 80, 77 N. W. 529 (1898).

[69] American Credit, etc., Co. v. Wood, 73 Fed. 81, 19 C. C. A. 264 (1896).

itself constitutes complete evidence of the contract, while the application, although it may modify the contract, is in the nature of defensive evidence entrusted to the insurer for his protection. As a matter of pleading, if the policy is set forth, and compliance with all conditions precedent recited in it is averred, there is no necessity for referring to the application, and the complaint or declaration is sufficient upon its face. Nothing is required to be proved which does not support some necessary allegation in the complaint, and there seems to be no good reason which requires the plaintiff to assume the burden of proving affirmatively the truth of the statements in an application not challenged by the defendant." In Minnesota it is held that a warranty is not a condition precedent, and that the burden of alleging and proving its falsity is upon the insurer.[70] Mr. Justice Mitchell said: "A condition precedent is known in the law of insurance as one which is to be performed before the agreement of the parties becomes operative; a condition subsequent calls for the performance of some act or happening of some fact after the contract is entered into, and upon the performance or happening of which its obligation is made to depend. In case of a mere warranty, the contract takes effect and becomes operative immediately. It is true that, where a policy of insurance so provides, if there is a breach of a warranty, the policy is void *ab initio*. But this does not change a warranty into a condition precedent, as understood in the law. It lacks the essential element of a condition precedent, in that it contains no stipulation that an event shall happen or an act shall be performed in the future, before the policy shall become effectual. It is more in the nature of a defeasance, where the insured contracts that, if the representations made by him are not true, the policy shall be defeated and avoided. But, even if these warranties are to be deemed conditions precedent, it has become settled in insurance law, for practical reasons, that the burden is on the insurer to plead and prove the breach of the warranties. Not only so, but he must, in his pleading, single out the answers whose truth he proposes to contest, and show the facts on which his contention is founded. Otherwise, the insured would enter the trial ignorant as to which of his numerous answers would be as-

[70] Chambers v. Northwestern, etc., Ins. Co., 64 Minn. 495, 67 N. W. 367 (1896); Hale v. Life Indemnity, etc., Co., 65 Minn. 548, 68 N. W. 182 (1896), overruling Price v. Phœnix, etc., Ins. Co., 17 Minn. 479, Gil. 473 (1871); Malicki v. Chicago, etc., Life Soc., 119 Mich. 151, 77 N. W. 690 (1899); Coburn v. Travelers' Ins. Co., 145 Mass. 226, 13 N. E. 604.

sailed as false. The number of questions in these applications is usually very great, relating to the habits and health of ancestors, the personal habits and condition of the applicant, etc., the truth of many of which it would be impossible to prove affirmatively after the death of the insured. To require such proof on the part of the beneficiary would defeat more than half of the life policies ever issued. On the other hand, it is no harship to require of the insurer, if he believes that any of these answers were false, that he specifically allege which ones he claims to be false, and produce evidence of the truth of his claim. * * * We therefore hold that it was no part of the plaintiff's case to either allege or prove the truth of the answers in the application, that the burden of alleging and proving their falsity was on the defendant, that it was bound to specify in its defense the particular answers which it claimed were false, and that on the trial it was properly limited in its proof to those answers which it had specifically alleged to be false." A condition subsequent in the policy, as an agreement to use diligence and care for the preservation of the property, need not be pleaded, as it is matter of defense.[71]

§ 119. Statutory provisions.—The manifest unfairness and injustice which result from making statements, whether material or not, strict warranties, has resulted in the enactment of statutes in a number of states which restrict the liberty of contract in this respect and provide a rule of construction for such provisions in insurance contracts. These statutes are remedial and are sustained as proper regulations of the business of insurance. The Ohio statute was recently before the supreme court of the United States, and the court said:[72] "It was for the legislature of Ohio to define the public policy of that state in respect of life insurance, and to impose such conditions on the transaction of business by life insurance companies within the state as was deemed best. We do not perceive any arbitrary classifications or unlawful discrimination in the legislation, but, at all events, we can not say that the federal constitution has been violated in the exercise in this regard by the state of its undoubted power over corporations."

[71] Johnston v. Northwestern, etc., Ins. Co., 94 Wis. 117, 68 N. W. 868 (1896).

[72] John Hancock, etc., Ins. Co. v. Warren, 181 U. S. 73 (1901), referring to § 3625, Ohio Rev. Stat.

§ 120. **The Massachusetts statute.**—The Massachusetts statute contains the following provisions: "No oral or written misrepresentation made in the negotiation of a contract or policy of insurance by the assured or in his behalf shall be deemed material or defeat or avoid the policy, or prevent its attaching, unless such misrepresentation is made with actual intent to deceive, or unless the matter misrepresented or made a warranty increased the risk of loss."[73] This act applies to all contracts of insurance and affects strict warranties as well as representations. In a case decided before the words "or made a warranty" in the last line were inserted, the court said:[74] "As to mere representations, the statute may well be held to be only declaratory, but as to warranties it made a new rule. In the opinion of the majority of the court, it speaks in terms neither of warranties nor of representations, technically so called, but deals with all representations made in negotiating the contract or policy. Misstatements of fact, whether the statement is said to be by the parties either a warranty or a representation, are equally representations, and are placed in each case upon the same footing by the statute which applies to them if the statements are called warranties by the parties, no less than if they are mere representations."

§ 121. **The Pennsylvania statute.**—In this state it is provided that "whenever the application for a policy of insurance contains a warranty of the truth of the answers therein contained, no misrepresentation or untrue statement in such application, made in good faith by the applicant, shall effect a forfeiture or be a ground of defense in any suit brought upon any policy issued upon the faith of such application, unless such misrepresentation or untrue statement relates to some matter material to the risk."[75] This legislation was intended to strike down literal warranties so far as they might be resorted to for the purpose of enforcing a forfeiture based on matters actually immaterial. It provides a rule of construction for the purpose of

[73] P. S. 119, § 181 (1895), ch. 271. The Minnesota statute (Laws 1895, ch. 175, § 20) is a copy of the Massachusetts act, omitting the words "or made a warranty," which were added in Massachusetts in 1895.

[74] White v. Provident Sav., etc. Soc., 163 Mass. 108, 39 N. E. 771 (1895). See further, Ring v. Phœnix Assur. Co., 145 Mass. 426, 14 N. E. 525; Durkee v. India Mut. Ins. Co., 159 Mass. 514, 34 N. E. 1133; Levie v. Metropolitan L. Ins. Co., 163 Mass. 117, 39 N. E. 792.

[75] Pa. Laws 1885, p. 134, § 1.

preventing injustice, and "it is as much the duty of courts to enforce such rules as it is to administer the statute of frauds and perjuries."[76] The effect is to leave open to judicial investigation in the ordinary way the question whether any fact concerning which inquiry was made, and an untrue answer given, was material to the risk. If found to be material, the policy will be avoided, whether the untrue answer was made in good faith or not. If not material, the breach of warranty will work no prejudice to the insured if the answer was given in good faith, but if in bad faith, and for the purpose of misleading the company, the policy will be avoided, notwithstanding the immateriality of the fact. Bad faith in this connection means with an actual intent to mislead or deceive, and does not include a misstatement honestly made through inadvertence, or even gross forgetfulness or carelessness.[77]

§ 122. **Similar provisions in other states.**—Similar statutes are found in other states. Thus, in Michigan, a breach of a condition in a fire policy will not render it void if the company has not been injured by such breach or a loss has not occurred during such breach or by reason thereof. The standard form of policy is required to contain a provision that "provided a loss shall occur on the property insured while such breach of condition continues or such breach of condition is the primary or continuing cause of the loss."[78] In Maryland, where the application for a policy of life insurance contains a warranty of the truth of the answers, "no representation or untrue statement in such application made in good faith by the applicant shall effect a forfeiture or be a ground of defense in any suit brought upon any policy of insurance issued upon the faith of such application, unless such misrepresentation or untrue statement relates to some matter material to the risk." In Kentucky "all statements or descriptions in any application for a policy of insurance shall be deemed and held representations and not warranties; nor shall any misrepresentations, unless material or fraudulent, prevent a recovery on the pol-

[76] Hermany v. Fidelity, etc., Ass'n, 151 Pa. St. 17, 24 Atl. 1064.

[77] Penn Mut. L. Ins. Co. v. Mechanics', etc., Co., 72 Fed. 413, 19 C. C. A. 286 (1896); Penn Mut. L. Ins. Co. v. Mechanics', etc., Co., 73 Fed. 653, 19 C. C. A. 316.

[78] Mich. Laws 1897, p. 214, act 167, Comp. Laws 1897, § 5180, applies to all policies issued after its passage, whether Michigan standard policies or not: McGannon v. Michigan, etc., F. Ins. Co. (Mich.), 87 N. W. 62, 54 L. R. A. 739 (1901).

icy."[79] In Maine "all statements of descriptions or value in an application or policy of insurance are representations and not warranties; erroneous descriptions or statements of value or title by the insured do not prevent his recovering on his policy unless the jury find that the difference between the property as described and as it really exists contributed to the loss or materially increased the risk; a change in the property insured or in its use or occupation, or a breach of any of the terms of the policy by the insured, do not affect the policy unless they increase the risk; nor shall any misrepresentation of the title or interest of the insured, in the whole or any part of the property insured, real or personal, unless material or fraudulent, prevent his recovering on his policy to the extent of his insurable interest."[80] In Iowa, subject to certain exceptions, "any condition or stipulation in any application, policy or contract of insurance making the policy void before the loss occurs shall not prevent recovery thereon by the insured, if it shall be shown by the plaintiff that the failure to observe such provision, or the violation thereof, did not contribute to the loss."[81] Similar provisions are found in Virginia,[82] Ohio,[83] New Hampshire,[84] Missouri,[85] Georgia,[86] and possibly in other states. Such statutes enter into and form a part of every contract of insurance made while they are in force.[87]

§ 123. **Controlling force of such statutes.**—Where such statutes are in force the parties can not contract as to what statements are material, as the question is to be judicially determined in each case by the court, if the materiality is obvious, or by the jury, if it depends upon disputed facts.[88] In Kentucky it was at first held that the par-

[79] Maryland Laws 1894, ch. 662; B. & C. Ky. Stat., ch. 32, § 639. See Germania Ins. Co. v. Rudwig, 80 Ky. 223 (1882), overruling Farmers' etc., Ins. Co. v. Curry, 13 Bush (Ky.) 312 (1877); Imperial F. Ins. Co. v. Kiernan, 83 Ky. 468 (1885); Kenton Ins. Co. v. Wigginton, 89 Ky. 330 (1889).

[80] Rev. St. Me., ch. 49, § 20. See also provision in Maine standard form of policy, construed in Linscott v. Orient Ins. Co., 88 Me. 497 (1895); Bigelow v. Granite, etc., Ins. Co., 94 Me. 39 (1900).

[81] McClain's Iowa Code, § 1743.

[82] Va. Laws 1900, ch. 515, p. 550.

[83] Ohio Rev. St. 1890, § 3625.

[84] New Hampshire Laws 1885, ch. 73.

[85] Mo. Rev. St. 1889, § 5849.

[86] Georgia Code 1882, §§ 2803, 2804. See Southern L. Ins. Co. v. Wilkinson, 53 Ga. 535 (1873); Mobile, etc., Ins. Co. v. Coleman, 58 Ga. 251 (1876).

[87] Klostermann v. Germania L. Ins. Co., 6 Mo. App. 582 (1879).

[88] Fidelity Mut. L. Ass'n v. Miller, 92 Fed. 63, 34 C. C. A. 211 (1899); Hermany v. Fidelity, etc., Ass'n, 151

ties could waive the benefits of the statute and by express contract determine the question of materiality,[89] but this was so manifestly contrary to the object of the law that the decision was reversed, and it is now held that only such statements as are material or fraudulent will avoid the policy.[90]

Pa. St. 17 (1888); Lutz v. Metropolitan L. Ins. Co., 186 Pa. St. 527, 40 Atl. 1104 (1898).

[89] Farmers', etc., Ins. Co. v. Curry, 13 Bush (Ky.) 312, 26 Am. Rep. 194 (1877).

[90] Germania Ins. Co. v. Rudwig, 80 Ky. 223 (1882). For construction of such statutes, see also National Bank v. Union Ins. Co., 88 Cal. 497, 26 Pac. 509 (1891); Fidelity, etc., Ass'n v. Ficklin, 74 Md. 172 (1891).

Part IV.

OF THE CONSIDERATION.

CHAPTER VII.

THE PREMIUM.

§ 125. **In general.**—The insurance company, for an agreed consideration, and upon condition that certain facts exist, binds itself upon a certain contingency to pay to the insured a fixed sum, or a sum to be determined by the amount of the loss. The amount to be paid by the insured, as a consideration therefor, is called the premium in ordinary insurance, and dues or assessments in mutual insurance and benevolent societies. It is payable according to stipulation which determines the amount and time of such payment. In the case of fire insurance, the premium is a stipulated sum for an insurance for a certain specified period, at the end of which the contract

terminates. Life insurance contracts may be for fixed periods, as for one year, or for life, with a provision for payment of premiums at stated annual or semi-annual intervals, under conditions which provide for forfeiture or termination of the contract if such premiums are not paid in advance upon a stipulated date.[1] Life insurance policies are also issued for a certain number of years, with a provision for termination at that time by payment to the insured of a certain amount in cash or the issuance to him of a paid-up policy. The consideration in what is known as mutual insurance and mutual benefit associations is payable at short intervals, and is known as assessments and dues. These amounts may be definitely fixed, or they may be left to be determined by the necessities of the case and subject to increase as the insured increases in age.

I. *The Premium in Ordinary Insurance.*

§ 126. Nature of premium.—The agreed consideration for assuming and carrying the risk is called the premium.[2] It is a stipulated sum in consideration of which the underwriter agrees to take upon himself the risk of loss and to indemnify the assured against it.[3] The amount or rate is generally agreed upon and inserted in the policy, but it may be determined by custom and usage.[4] The contract may provide for an increase or reduction in the rate of premium as certain risks are added to or eliminated from the contract. The payment of the premium and the assumption of the risk are correlative; hence if the premium is not paid the insurance does not attach; if the risk does not attach the premium paid may be recovered.[5] A clause in the policy of an assessment company providing that the rate of assessment may be changed each five years to correspond with the actual mortality experience of the company authorizes it to change the rates at different ages as required by the results of its experience.[6]

[1] See § 358, *infra*. As to the distinction between a policy for a short term and one for life, see McDougall v. Provident, etc., Soc., 135 N. Y. 551, 32 N. E. 251 (1892); McMaster v. New York L. Ins. Co. (U. S.), 22 Sup. Ct. 10 (1901).

[2] Emerigon Ins. (Meredith's ed.), ch. 3, § 1.

[3] As to the nature of the premium in tontine insurance, see Uhlman v. New York L. Ins. Co., 109 N. Y. 421 (1888); Thompson v. Thorne, 83 Mo. App. 241 (1899).

[4] Pollock v. Donaldson, 3 Dall. (U. S.) 510 (1799).

[5] Waller v. Northern Assur. Co., 64 Iowa 101 (1884). See § 135, *infra*.

[6] Mutual Res. Fund L. Ass'n v.

In many states there are statutes which forbid discriminating against colored persons in the rates of premiums, and which require uniform rates for all persons of the same class and equal expectancy of life.[7] These statutes, which make it a criminal offense for an agent to rebate a premium, do not unduly interfere with the right to contract, and are constitutional.[8]

§ 127. **Obligation to pay premium.**—Whether the amount of the stipulated premium becomes a debt due from the insured to the insurer depends entirely upon the contract and the circumstances.

Taylor (Va.), 37 S. E. 854 (1901). An insurance policy contained a table of ages from 25 to 60 years, showing a gradual increase in the premium from the first age named to the last. It also contained a provision that the company agreed to renew insurance during each successive year of the life of the insured, "from date hereof," on payment on or before a certain date in each successive year of the annual premium rate for the age attained, in accordance with the table mentioned. No figures were given beyond the age of sixty, but the premiums thereafter, it was held, were to be determined by calculation on the rule of progression shown by the table, and do not continue the same as that provided for the age of sixty: Nall v. Provident Sav. L. Assur. Soc. (Tenn. Ch.), 54 S. W. 109.

[7] See note to Joyce Ins., § 1091, where the statutes are collected. In Key v. National L. Ins. Co., 107 Iowa 446, 78 N. W. 68 (1899), it was held that the statute would not prevent a person who consented to take out a policy of insurance on the representation that the company could make her a loan, from recovering the premium after the loan was refused. The court said: "It is insisted that the making of the loan was a condition subsequent to the acceptance of the policy; that the contract of insurance went into force, and the plaintiff's liability accrued thereon, before any obligation was incurred to make the loan; therefore, that the plaintiff's indebtedness for the premium was entirely independent of any right she may have to insist on her other claim. This is not the contract disclosed by the testimony. As a matter of fact, the taking out of the insurance was but an incident; the making of the loan was the principal subject-matter of the agreement. The contract, as already said, was entire, and it was distinctly understood and agreed that the plaintiff was not to accept the policy unless she could secure the loan. She received the policy into her possession upon a condition that the company refused to perform, and because of this failure she refused to accept it. This she had a right to do. Upon this proposition the case of Harnickell v. New York L. Ins. Co., 111 N. Y. 390, 18 N. E. 362, is directly in point, and supports our holding." As to the right of an insurance agent under such a statute to contribute his commission, see Quigg v. Coffy, 18 R. I. 757, 36 Atl. 704 (1894).

[8] People v. Formosa, 131 N. Y. 478, 30 N. E. 492 (1892).

Where the payment is made a condition precedent to the attaching of the risk, and it is not made, the insured assumes no further liability; but if the contract goes into effect and the insured has had the benefit of the insurance, the premium becomes a debt, which may be collected in an action at law. A premium which is to become due annually or semi-annually, and is payable in advance on a contract which contains a stipulation that the policy shall lapse if the premium is not paid when due, is not a debt. So, an insurance contract with a benevolent association which provides for a forfeiture of all benefits if a member fails to pay his assessment at a specified time does not create an obligation which is enforceable by the association or by its receiver.[9] The payment in such case is optional with the insured, but if the policy attaches and the premium is earned under an agreement of credit, as where a note is given for the premium, a debt is created which may be recovered even after the policy has been forfeited.[10]

§ 128. **Payment—Condition precedent—Forfeiture.**—The actual payment of the premium before the risk attaches is not necessary unless such payment is made a condition precedent by the terms of the contract.[11] This is not ordinarily done in cases of marine and fire insurance, but is customary in cases of life insurance.[12] When it is

[9] Vick v. Clark, 77 Ill. App. 599 (1897).

[10] Goodwin v. Massachusetts, etc., Ins. Co., 73 N. Y. 480 (1878). A mortgagee may, by the terms of the policy, become liable for the premium: See St. Paul, etc., Ins. Co. v. Upton, 2 N. Dak. 229, 50 N. W. 702 (1891). Sending a policy to the assured on his promise to remit the premium does not estop the company from denying its validity for non-payment of the premium as against a mortgagee, "to whom loss, if any, is payable," although such mortgagee received the policy which acknowledged the receipt of the premium from the assured with notice that the premium was not paid. Such a policy is not an insurance upon the interest of the mortgagee: Union Bldg. Ass'n v. Rockford Ins. Co., 83 Iowa 647, 14 L. R. A. 248 (1891). See Continental Ins. Co. v. Hulman, 92 Ill. 145, 34 Am. Rep. 122.

[11] Newark Mach. Co. v. Kenton Ins. Co., 50 Ohio St. 549, 22 L. R. A. 768 (1893); Campbell v. American F. Ins. Co., 73 Wis. 100, 40 N. W. 661 (1888). Where an application for a life insurance policy states on its face that payment of its premium is a condition precedent to the issuing of the policy, the policy is not in force until it is actually paid: Ormond v. Fidelity L. Ass'n, 96 N. C. 158 (1887). See Tomsecek v. Travelers' Ins. Co. (Wis.), 88 N. W. 1013 (1902).

[12] Howell v. Knickerbocker L. Ins. Co., 44 N. Y. 276 (1871). Where payment of the premium on or before a certain date is made a condition precedent to the contract re-

expressly provided that the premium on a life insurance policy shall be paid on or before a certain date, and in default thereof the policy shall be void, the non-payment of the premium on the date named works a forfeiture of the contract.[13] In such cases time is of the essence of the contract, and payment on the following day will not do. Where the policy so provides, the prompt payment of the note which has been given for the premium is necessary to save the contract.[14] Equity will not release from such a forfeiture.[15] Of course, the company may extend the time of payment by an agreement express or implied, or it may be estopped by its conduct from asserting a forfeiture, or the contract may be suspended, as by the operation of war.[16]

A fraternal society doing a life insurance business may waive the provisions of the law in regard to the forfeiture of the insurance by failure to require payment of premiums as required by its by-laws.[17] It is not necessary that the insurance company expressly waive its right to insist upon a forfeiture, as a waiver may be implied from the circumstances.[18] Part payment of a premium will not prevent a forfeiture.[19] The contract sometimes provides that it shall be merely suspended during the period of non-payment of the premium, and subject to revival when the payment is actually made.[20] In such cases the contract ordinarily contemplates that payment must be made before a loss occurs.[21] In some states it is provided that there can be no forfeiture of a policy until after the company has notified the insured of the time when his premium is due.[21a]

maining in force, non-payment is not excused by the fact that payment is prevented by conditions over which the insured has no control, as by act of God.

[13] Fowler v. Metropolitan L. Ins. Co., 116 N. Y. 389, 22 N. E. 576, 5 L. R. A. 805 (1889) and note; Bosworth v. Western, etc., Soc., 75 Iowa 582, 39 N. W. 903 (1888).

[14] Robert v. New England, etc., Ins. Co., 1 Disn. (Ohio) 355 (1857), 2 Disn. 106.

[15] Klein v. Ins. Co., 104 U. S. 88 (1881); Attorney-General v. Continental L. Ins. Co., 93 N. Y. 70 (1883).

[16] Mutual, etc., Ins. Co. v. Hillyard, 37 N. J. L. 444 (1874).

[17] McMahon v. Supreme Tent, etc., 151 Mo. 522, 52 S. W. 384 (1899).

[18] Jones v. Preferred Bankers' L. Assur. Co., 120 Mich. 211, 79 N. W. 204 (1899).

[19] Willcuts v. Northwestern, etc., Ins. Co., 81 Ind. 300 (1882).

[20] Joliffe v. Madison Mut. Ins. Co., 39 Wis. 111, 20 Am. Rep. 35 (1875).

[21] Matthews v. Ins. Co., 40 Ohio St. 135 (1883); Miller v. Union, etc., Ins. Co., 110 Ill. 102 (1884).

[21a] See Mutual L. Ins. Co. v. Hathaway, 106 Fed. 816 (1901); Mutual L. Ins. Co. v. Cohen, 179 U. S. 262 (1900).

§ 129. **Manner, time and place of payment.**—The premium may be paid to the company or its duly authorized agent,[22] and may be in cash or in any other commodity which the insurer is willing to accept.[23] Presumably it is payable in cash, but if credit is given it is equally as effective as cash. If there is no provision making the prepayment of the premium a condition precedent, the agent who negotiated the insurance may give credit for the premiums,[24] and even where a provision in the policy calls for the actual payment of the premium as a condition precedent to its going into effect, such provision may be waived by a general agent of the company. Upon this the authorities are in substantial accord.[25]

Where a policy recites that it is issued in consideration of an annual premium, "to be paid in advance to the company," the beneficiary must show that the premium was paid, and it is not sufficient to show merely the execution of a promissory note for the amount, which recites that it is accepted on condition that if it is not paid at maturity the policy shall be void.[26] The acceptance of an order on a third person is a payment if such was the intention of the parties.[27] Payment may be by check when the custom and course of dealing have been such as to justify the insured in believing that it would be accepted as cash.[28] The payment of the premium with misappropriated funds is good as against the insurer, although the fund arising from the payment of the policy may belong to the person whose money was

[22] Pennsylvania Ins. Co. v. Carter (Pa.), 11 Atl. 102 (1887).

[23] See Anchor L. Ins. Co. v. Pease, 44 How. Pr. (N. Y.) 385 (1873). An agent can not without express authority accept payment in personal property: Hoffman v. Hancock, etc., Ins. Co., 92 U. S. 164 (1895).

[24] But an agent without authority to issue a policy can not bind the company by an agreement to extend the time of payment: Critchett v. American Ins. Co., 53 Iowa 404 (1880). It is not essential to the validity of a fire insurance policy, issued in renewal of a previous one, that the insured should pay the renewal premium in cash, provided the insurance agent, with the express or implied assent of the company, pays or undertakes to become responsible to the company for the premium, in order that credit may be extended to the insured: Fireman's Fund Ins. Co. v. Pekor, 106 Ga. 1, 31 S. E. 779 (1898).

[25] McDonald v. Provident, etc., L. Assur. Soc., 108 Wis. 213, 84 N. W. 154 (1900). See Tomsecek v. Travelers' Ins. Co. (Wis.), 88 N. W. 1013 (1902).

[26] Manhattan L. Ins. Co. v. Myers (Ky.), 59 S. W. 30 (1900).

[27] Lyon v. Travelers' Ins. Co., 55 Mich. 141, 54 Am. Rep. 354 (1884); National Ben. Ass'n v. Jackson, 114 Ill. 533 (1885); McMahon v. Travelers' Ins. Co., 77 Iowa 229 (1899).

[28] Kenyon v. Knights, etc., Ass'n, 122 N. Y. 247, 25 N. E. 299 (1890).

illegally used.[29] Payment may be made by any one[30] to the company or its authorized agent[31] at the time[32] and place provided by the policy, or determined by special agreement or custom.[33] The date when the premium is paid, and not that written in the policy for the payment of the premium, is the time from which to reckon the period when further prémiums are due.

The mere acceptance of an insurance policy will not imply assent by the insured to a clause interpolated in the policy making future premiums payable in less time than is provided in the original contract between the parties, unless the attention of the insured was called to such provision.[34] Where the course of dealing has been such as to warrant it, payment of the premium may be made by mail, and it is sufficient if the check was mailed on the last day of payment.[35] When the insured is directed to send the money by express, delivery to the express agent is payment, although the money is embezzled by such agent.[36] Premiums may be paid in part or in whole by dividends accruing according to the terms of the policy,[37] but undeclared dividends can not be treated as funds applicable to such use.[38]

§ 130. The giving of a promissory note.—The insurance company may accept a promissory note in payment of the premium, although the contract expressly provides for the payment in cash.[39] A pro-

[29] Holmes v. Gilman, 138 N. Y. 369 (1893).

[30] Leslie v. French, L. R. 23 Ch. Div. 552 (1883).

[31] Critchett v. American Ins. Co., 53 Iowa 404, 36 Am. Rep. 230 (1880).

[32] In determining the time of the notice that a premium will fall due under the New York statute providing for a notice at least thirty days, and not more than sixty days, prior to the day when the premium is payable, the premium is to be deemed payable on the day of its maturity, and not the date to which an extension of the time of payment is allowed by the policy: Trimble v. New York L. Ins. Co., 20 Wash. 386, 55 Pac. 429 (1898).

[33] Williams v. Washington L. Ins. Co., 31 Iowa 541 (1871); Blackerby v. Continental Ins. Co., 83 Ky. 574 (1886).

[34] McMaster v. New York L. Ins. Co., 99 Fed. 856 (1899). See s. c. in 22 S. Ct. Rep. 10 (1901).

[35] Taylor v. Merchants' F. Ins. Co., 9 How. (U. S.) 390 (1850).

[36] Whitley v. Piedmont, etc., Ins. Co., 71 N. C. 480 (1874).

[37] Hull v. Northwestern, etc., Ins. Co., 39 Wis. 397 (1876). Equity will compel the application of dividends earned to prevent a forfeiture: Franklin L. Ins. Co. v. Wallace, 93 Ind. 7 (1883), and cases cited.

[38] Mutual L. Ins. Co. v. Girard L. Ins. Co., 100 Pa. St. 172, 10 Ins. Law Jour. 273–275 (1882), annotated.

[39] Krause v. Equitable L. Assur. Co., 99 Mich. 461, 58 N. W. 496 (1894); Pitt v. Berkshire Ins. Co., 100 Mass. 500 (1868).

vision in a policy that it shall not be in force until the first payment is made in cash during the life-time and good health of the insured is complied with by the execution of a note to the insurance company's agent for an amount greater than the premium, where the agent indorsed and discounted the note, gave the insured the company's receipt for the amount of the premium, reported it to the company as paid, and received from the company and delivered to the insured the policy, which recited that it was given in consideration of the application and "of the first premium paid on or before the delivery hereof."[40]

The delivery of the policy is a sufficient consideration for the note.[41] Such a note may be taken as payment,[42] or as an extension of the time of payment, under the provision that the insurance shall terminate if the note is not paid at maturity, or it may be accepted as a conditional payment.[43] If neither the policy nor the note contains a provision for the forfeiture or suspension of the risk upon the non-payment of the note, the policy continues in force although the note is not paid at maturity.[44] The rights of the parties are governed by the terms of the agreement. It is common to provide that the policy shall be merely suspended while the note is overdue and that the company shall not be liable for loss occurring during such suspension.[45] There is a conflict of authority as to whether a note given for the premium, and containing a provision to the effect that the policy shall be forfeited if the note is not paid at maturity, must be presented for payment and demand made before the policy can be declared void.[46] It is said that "when the condition as to forfeiture for the non-payment at maturity of a note given for the premium is contained only in the

[40] Jacobs v. Omaha L. Ass'n, 146 Mo. 523, 48 S. W. 462 (1898).

[41] Marskey v. Turner, 81 Mich. 62, 45 N. W. 644 (1890).

[42] Michigan Mut. L. Ins. Co. v. Bowes, 42 Mich. 19 (1879).

[43] Knickerbocker L. Ins. Co. v. Pendleton, 112 U. S. 696 (1884).

[44] McAllister v. New England, etc., Ins. Co., 101 Mass. 558 (1869). The forfeiture clause was construed to apply to future premium payments only.

[45] Robinson v. Continental Ins. Co., 76 Mich. 641, 43 N. W. 647 (1889); Phenix Ins. Co. v. Bachelder, 32 Neb. 490, 29 Am. St. 443 (1891).

[46] That notice and demand are necessary, see Pendleton v. Knickerbocker L. Ins. Co., 5 Fed. 238 (1881); Travelers' Ins. Co. v. Pulling, 159 Ill. 603 (1896). *Contra*, Roehner v. Knickerbocker L. Ins. Co., 63 N. Y. 160 (1875); McIntyre v. Michigan, etc., Ins. Co., 52 Mich. 188 (1883). Protest of the note is not necessary: Knickerbocker L. Ins. Co. v. Pendleton, 112 U. S. 696 (1884).

note, the mere fact that the note is not paid at maturity does not of itself avoid the policy. Such a provision is a condition subsequent of which the company must avail itself by clear and unequivocal acts. It must demand payment at the proper time, and if no payment is made must declare the policy forfeited or void."[47] Such a provision in a note has been held of no effect whatever.[48] The company or its general agent may accept the note of a third party in payment of the premium.[49]

§ 131. **Payment after loss or death.**—If credit is given or the time to pay the premium is extended by an agreement under which the policy remains in force, there can be a recovery if the loss or death occurs within such period of extension.[50]

The company is under no obligation to accept a premium tendered after the time fixed for its payment, but it may by a course of dealing, which will justify the insured in relying thereon, deprive itself of the right to refuse to accept payment and insist upon the strict adherence to the terms of the original contract. But in order to establish authority in an agent to receive an overdue premium after the death of the insured, an express authority to do so conferred upon him by the company must be shown.[51]

The death or loss for which there can be a recovery must have occurred before the premium was due by the express terms of the contract, or within the period of extension created by the conduct of the insurer and while the policy was in force and not suspended.[52] It is not uncommon for insurance companies to provide for a certain period known as days of grace within which they will accept premiums. Ordinarily the contract provides that during such days of grace the premium will be accepted upon a certificate that the insured is in good health at that time. Before the company can be

[47] See Mutual L. Ins. Co. v. French, 30 Ohio St. 240, 27 Am. St. 443 (1876), and cases there cited.

[48] Dwelling-House Ins. Co. v. Hardie, 37 Kan. 674, 16 Pac. 92 (1887). See Hastings v. Brooklyn L. Ins. Co., 138 N. Y. 473 (1893); Union, etc., Ins. Co. v. Buxer, 62 Ohio St. 385, 57 N. E. 66 (1900).

[49] Franklin L. Ins. Co. v. Wallace, 93 Ind. 7 (1883).

[50] Miller v. Union Cent. L. Ins. Co., 110 Ill. 102 (1884). A premium sent after a loss is presumed to be too late, and the burden of proving its acceptance is on the insured: Moore v. Rockford Ins. Co., 90 Iowa 636, 57 N. W. 597 (1894).

[51] Lantz v. Vermont L. Ins. Co., 139 Pa. St. 546, 10 L. R. A. 577 (1891), and cases therein cited.

[52] Farnum v. Phœnix Ins. Co., 83 Cal. 246, 23 Pac. 869 (1890).

required to accept payment after the death of the insured it must very clearly appear that such was the intention of the parties.[53] It is not to be presumed that an insurer intended to accept an overdue premium after the death of the insured, unless such intention clearly appears from the terms of the contract.[54]

§ 132. **Paid-up policies.**—Many life insurance contracts provide that upon the payment of a specified number of premiums, the insured shall, upon certain conditions, be entitled to a paid-up policy. The rights of the parties under such policies are determined entirely by the provisions of the contract and the statutes in force when the policy is issued.[55] It is generally provided that the insured shall surrender the old policy within a specified time and receive a new policy, although this is sometimes effected by a mere indorsement upon the old policy.[56] By the weight of authority the right must be exercised within the time specified,[57] although it has been held that it is sufficient if this is done within a reasonable time.[58] A paid-up policy may be subject to the same conditions as the old, or it may be absolutely non-forfeitable, depending entirely upon its terms.

§ 133. **Premium notes.**—Under some statutes premium notes are given as a part of the capital stock of the corporation. These must be distinguished from promissory notes given by the insured as a part of the premium. In some mutual companies premiums are paid partly in cash and partly in notes upon which dividends earned by the company are credited and assessments made from time to time as losses occur. Notes given as a part of the capital stock of a mutual company, in the absence of a statutory provision to the contrary, are payable absolutely without reference to losses, and may be

[53] See Howell v. Knickerbocker L. Ins. Co., 44 N. Y. 276 (1871); Trustees v. Brooklyn F. Ins. Co., 19 N. Y. 305 (1859); Mutual Ben. L. Ins. Co. v. Ruse, 8 Ga. 534 (1850); Pritchard v. Merchants', etc., Assur. Soc., 3 C. B. (N. S.) 622 (1858).

[54] Mobile, etc., Ins. Co. v. Pruett, 74 Ala. 487 (1883).

[55] Mound City, etc., Ins. Co. v. Twining, 12 Kan. 475 (1872); Hanley v. Life Ass'n, 69 Mo. 380 (1879).

[56] Holman v. Continental L. Ins. Co., 54 Conn. 195, 1 Am. St. 97 (1886); McQuitty v. Continental L. Ins. Co., 15 R. I. 573, 10 Atl. 635 (1887).

[57] Knapp v. Homeopathic, etc., Ins. Co., 117 U. S. 411 (1885).

[58] Bruce v. Continental L. Ins. Co., 58 Vt. 253 (1885). As to the right to a paid-up policy without paying outstanding premium note, see Van Norman v. Northwestern, etc., Ins. Co., 51 Minn. 57 (1892); Holman v. Continental L. Ins. Co., 54 Conn. 195, 1 Am. St. 97 (1886).

transferred and negotiated so as to pass a good title to the transferee free from equities existing between the original makers.[59] But the ordinary premium notes, which are payable only upon a contingency, are not negotiable.[60] Where the contract so provides, the maker of a premium note may terminate his liability thereon for future losses by rescinding his insurance contract. After his policy is canceled no liability exists except for losses which had already occurred.[61]

§ 134. **Notice of time when premium is due.**—In the absence of a statute requiring notice to the insured that a premium will become due at a certain time, the company is under no obligation to give such notice, unless it has by a course of dealing established a custom upon which the insured is entitled to rely. In such a case the usage enters into and forms a part of the contract between the parties,[62] and it is generally held that the company can not suddenly cease its established practice and claim a forfeiture of the policy. But the cases are not all in harmony. In some states it is held that the company may discontinue the practice of sending notice, and that a failure to give the usual notice will not prevent a forfeiture unless it is done for the purpose of misleading the insured and avoiding the policy.[63] Where a statute requires notice to be given, the burden is on the company to show that it has complied with the statute.[64] Such a re-

[59] White v. Haight, 16 N. Y. 310 (1867).

[60] Hope, etc., Ins. Co. v. Weed, 28 Conn. 50 (1859).

[61] Langworthy v. Washburn, etc., Co., 77 Minn. 256 (1899); American Ins. Co. v. Garrett, 71 Iowa 243. 32 N. W. 356 (1887). The assessment should be made upon the balance of the premium note remaining unpaid: Davis v. Oshkosh, etc., Co., 82 Wis. 488, 52 N. W. 771 (1892). An assessment by a mutual insurance company may be based on the balance due on the premium notes after the payment of previous assessments, where the different classes of notes constituting the assets of the company have previously paid assessments varying in amount, and another assessment upon the face value would subject some of them to more than the extreme limit of liability, which is fixed by N. H. Laws 1847, ch. 501, at the amount of the deposit note: New Boston F. Ins. Co. v. Saunders, 67 N. H. 249, 34 Atl. 670 (1892).

[62] Manhattan L. Ins. Co. v. Smith, 44 Ohio St. 156 (1886); Attorney-General v. Continental L. Ins. Co., 33 Hun (N. Y.) 138 (1884); Grant v. Alabama, etc., Ins. Co., 76 Ga. 575 (1886).

[63] Smith v. National L. Ins. Co., 103 Pa. St. 177 (1883); Girard Life Ins., etc., Co. v. Mutual L. Ins. Co., 97 Pa. St. 15 (1881). See also Mutual, etc., Ass'n v. Essender, 59 Md. 463 (1882).

[64] Baxter v. Brooklyn L. Ins. Co., 44 Hun (N. Y.) 184 (1887).

quirement must be strictly complied with. Thus, in New York, where the statute provides that the notice shall contain a statement that "prompt payment is necessary to keep the policy in force," it is not sufficient to give a notice to the effect that in default of payment the policy will "become forfeited and void."[65] The day upon which the notice was mailed should be excluded in the computation of the thirty days for which notice must be given under the New York statute.[66] Where the requisite notice was not given, and the policy contained a provision for forfeiture, the court said: "The notice given before the premium fell due was insufficient, and no notice whatever was given after the non-payment of that premium. The effect of the prohibition against declaring a forfeiture of the interest of the assured under the contract was to keep the policy alive as a valid subsisting insurance, notwithstanding the stipulations of the parties to the contrary. The duration of the policy, so long as it was domi-

[65] Phelan v. Northwestern, etc., Ins. Co., 113 N. Y. 147 (1889). The New York statute provides that "no life insurance company doing business in the state of New York shall have power to declare forfeited or lapsed any policy hereafter issued or renewed by reason of non-payment of any annual premium or interest, or any portion thereof, except as hereinafter provided. Whenever any premium or interest due upon any such policy shall remain unpaid when due, a written or printed notice stating the amount of such premium or interest due on such policy, the place where said premium or interest should be paid, and the person to whom the same is payable, shall be duly addressed and mailed to the person whose life is assured." Omitting the description of the part of the notice for the payment of an unpaid premium, and declaring a forfeiture if the notice is not complied with, the final proviso reads: "Provided, however, that a notice stating when the premium will fall due, and that if not paid the policy and all payments thereon will become forfeited and void, served in the manner hereinbefore provided, at least thirty and not more than sixty days prior to the day when the premium is payable, shall have the same effect as the service of the notice hereinbefore provided for."

[66] Rosenplanter v. Provident, etc., Soc., 96 Fed. 721, 37 C. C. A. 566 (1899). The notice is complete on mailing a registered letter properly addressed to the insured: McKenna v. State Ins. Co., 73 Iowa 453 (1887). The "date" of a notice, served by mail, of an assessment in a mutual insurance association, when the amount of the assessment is, by the rules of the association, to be paid within a certain number of days from the "date of the notice," is not the date printed in the notice itself, but is the day on which the notice is mailed, or is or should be received by the member in due and regular course of mail: Bridges v. Nat. Union (Minn.), 77 N. W. 411 (1898).

nated by the statute, was not dependent upon the payment of premiums on the day named therein, but upon payment within thirty days after the statutory notice should be given. The only way in which the policy could be terminated under the statute was by the failure of the insured to pay his premium upon notice "mailed" thirty days before the premium was due, or by a notice of default and demand for payment within thirty days after mailing such notice."[67]

Where the statute requires certain notice before the maturity of a life insurance premium as a condition of forfeiting the policy for non-payment, notwithstanding stipulations to the contrary in the contract, it does not become a part of a policy issued while the statute is in force so as to be operative after the statute is repealed. The repeal simply permits the enforcement of the conditions of the contract according to its own terms and conditions.[68]

§ 135. **Right to recover premiums paid.**—The insurance company has no right to the consideration until the contract is consummated by the assumption of the risk. But where the risk has attached, and the contract is subsequently forfeited by the breach of a condition, the premiums which have been paid can not be recovered back.[69] If the policy was void *ab initio,* the premiums paid may be recovered, and a premium note is not enforceable.[70] Assessments paid for a series of years to a mutual insurance association by a member can not be recovered back simply because he failed to inform himself of the provisions of the contract.[71] The provision in an application for a policy of life insurance that the statements and promises of the agent shall not affect the rights of the company, unless reduced to writing and presented with the application, does not entitle the company to retain money received in consequence of fraud practiced by the agent after its knowledge of the fraud. As the agent had practiced fraud on both parties, the contract was held voidable at the instance of either

[67] Baxter v. Brooklyn L. Ins. Co., 119 N. Y. 450, 7 L. R. A. 293 (1890).

[68] Rosenplanter v. Provident, etc., Soc., 96 Fed. 721, 37 C. C. A. 566 (1899), and cases cited.

[69] Home Fire Ins. Co. v. Kuhlman, 58 Neb. 488, 78 N. W. 936 (1899), and cases cited; United States L. Ins. Co. v. Smith, 92 Fed. 503, 34 C. C. A. 506 (1899).

[70] Ford v. Buckeye State Ins. Co., 6 Bush (Ky.) 133, 99 Am. Dec. 663 (1869); York County, etc., Ins. Co. v. Turner, 53 Me. 225 (1865); Home Ins. Co. v. Daubenspeck, 115 Ind. 306, 17 N. E. 601 (1888).

[71] Condon v. Mutual, etc., Ass'n, 89 Md. 99, 42 Atl. 944 (1899).

party.[72] Premiums paid upon a void policy may be recovered, unless the insured has been guilty of fraud.[73] Thus, where a daughter paid the premiums on the life of her father, with his knowledge, with the understanding that she had an insurable interest in his life, she was permitted to recover the premiums as money paid under a mistake of law.[74] So, where a wife, without the consent of her husband, procured insurance upon his life, and paid the premiums out of money furnished by him for household expenses, the husband was permitted to recover the premiums, although the company did not know that the money belonged to him.[75]

II. *Assessments in Mutual Companies and Benevolent Societies.*

§ 136. **Dues and assessments.**—Many questions which have been before the courts relating to dues and assessments in mutual insurance companies and benevolent societies can not be discussed here. These organizations are generally regarded as insurance companies.[76] They are organized under special statutes, which provide in great detail for their methods of doing business, and these statutes, in connection with their by-laws and certificates, govern the rights of the parties. The insured becomes a member of the organization, and, as a consideration for the insurance and other benefits, he agrees to pay certain dues and assessments, to be levied and collected in accordance with the terms of his contract. In mutual companies upon the assessment plan the insured is required to pay from time to time to the proper authorities such sum as shall be assessed under the by-laws for the purpose of paying losses and expenses.[77] If a premium note

[72] McKay v. New York L. Ins. Co., 124 Cal. 270, 56 Pac. 1112 (1899).

[73] Jones v. Insurance Co., 90 Tenn. 604, 18 S. W. 260 (1891).

[74] Metropolitan L. Ins. Co. v. Blesch (Ky.), 58 S. W. 436 (1900). See also Mutual L. Ins. Co. v. Elliott, 93 Tex. 144, 53 S. W. 1014 (1899); Stilwell v. Covenant, etc., Ins. Co., 83 Mo. App. 215 (1900).

[75] Metropolitan L. Ins. Co. v. Smith (Ky.), 59 S. W. 24, 53 L. R. A. 817 (1900).

[76] See Penn Mut., etc., Co. v. Mechanics', etc., Co., 19 C. C. A. 286, 72 Fed. 413 (1896).

[77] Ellerbe v. Barney, 119 Mo. 632, 25 S. W. 384 (1893). As to the various plans, see Crossman v. Massachusetts Ben. Ass'n, 143 Mass. 435, 9 N. E. 753 (1887); In re La Solidarité, etc., Ass'n, 68 Cal. 392 (1886). As to the distinction between a premium and an assessment, see State v. Monitor F. Ass'n, 42 Ohio St. 555 (1885).

is given, the assessment is made upon the note, and can not exceed the maximum liability as expressed thereby.[78] The rate of assessment may be determined by the proper authorities according to the losses and expenses, or it may be previously determined and inserted in the contract. It may be subject to increase by vote of the stockholders, and a member who assents to an increase in his assessment by voting therefor in a stockholders' meeting can not thereafter complain that it is unreasonable.[79]

§ 137. **Liability to assessment.**—The liability for assessments rests upon those who, by becoming members of the company, assume the contractual obligation imposed by its by-laws.[80] Such liability must grow out of the contract or statute,[81] and where the statute fixes it at a certain amount it can not be limited to a less amount by a special agreement. If the liability is absolute and certain, an action may be maintained against a member for its enforcement, but the rule is otherwise if the liability terminates with the forfeiture of the rights of the member.[82]

§ 138. **Effect of non-payment of assessment.**—The non-payment of an assessment may result, *ipso facto,* in the forfeiture of the rights of the member as a beneficiary, or merely in his suspension from the rights and privileges of membership. Where it is expressly provided that such non-payment shall result in suspension or forfeiture, no

[78] Davis v. Oshkosh, etc., Co., 82 Wis. 488, 52 N. W. 771 (1892).

[79] Mutual, etc., Ass'n v. Taylor (Va.), 37 S. E. 854 (1901).

[80] Com. v. Massachusetts, etc., Ins. Co., 112 Mass. 116 (1873); Tolford v. Church, 66 Mich. 431, 33 N. W. 913 (1887).

[81] Com. v. Massachusetts, etc., Ins. Co., 112 Mass. 116 (1873).

[82] Tolford v. Church, 66 Mich. 431, 33 N. W. 913 (1887); Ellerbe v. Barney, 119 Mo. 632, 25 S. W. 384 (1893). One to whom a certificate of fire insurance is issued is not liable for assessments theretofore made against a person in control of the property, who held a separate certificate of membership in the company and under whom the insured does not claim any right, title, or interest in the property where the liability for assessments is purely personal: Monger v. Rockingham, etc., Ins. Co., 96 Va. 442, 31 S. E. 609 (1898). It is no defense to an action on a premium note given by the insured, that an agent of the company, who had no authority to bind it to pay the cash surrender value of an old policy, told the insured that there would be "no trouble" about getting such cash surrender value, as it is the mere expression of an opinion: Garber v. Bresee, 96 Va. 644, 32 S. E. 39 (1899).

affirmative action on the part of the association or lodge is necessary.[83] But where the fundamental law provides that upon non-payment a member shall be suspended by the proper authorities, his membership is not affected until the power thus conferred is exercised.[84] When the annual assessment is required to be paid on a day certain, but the assured does not know the exact amount because of dividends which he is entitled to have applied, there can not be a forfeiture until notice has been given him.[85]

§ 139. **Withdrawal of member.**—A member of a mutual or benevolent insurance company may generally withdraw at pleasure, and thus relieve himself from liability for assessments for further losses, but he remains liable for assessments thereafter made for the purpose of paying losses which had occurred while he was a member.[86]

§ 140. **Insolvency of company.**—Upon the insolvency of the company, any receiver may levy assessments upon such as under the contract are absolutely liable for losses of the company, but not upon such as are relieved from further liability by forfeiture of their rights.[87] The obligation upon a premium note is not affected by the insolvency of the company, and the receiver may, under the authority of the court, within the terms of the contract, make such assessments

[83] Mandego v. Centennial, etc., Ass'n, 64 Iowa 134 (1884); Mueller v. Grand Grove, etc., 69 Minn. 236, 72 N. W. 48 (1897); Goodman v. Jedidjah Lodge, 67 Md. 117 (1887); Hansen v. Supreme Lodge, 140 Ill. 301 (1897); Burdon v. Massachusetts, etc., Ass'n, 147 Mass. 360 (1888). Where a member of a mutual insurance company has obligated himself to pay such annual assessments as shall be made, not to exceed a specified sum each year, and in anticipation of an annual assessment pays to the treasurer the amount of an annual assessment in advance, and such assessment is not in fact made, the sum so paid stands to his credit, and he has a right to apply the same on an assessment for a succeeding year: Montgomery v. Harker (N. Dak.), 84 N. W. 369 (1900).

[84] Scheufler v. Grand Lodge, 45 Minn. 256, 47 N. W. 799 (1881). Effect of suspension of subordinate lodge: Young v. Grand Lodge, 173 Pa. St. 302, 33 Atl. 1038 (1896).

[85] Phœnix Ins. Co. v. Doster, 106 U. S. 30 (1882).

[86] Langworthy v. Washburn, etc., Co., 77 Minn. 256 (1899); Ionia, etc., Ins. Co. v. Otto, 96 Mich. 558, 56 N. W. 88 (1893); Detroit, etc., Ins. Co. v. Merrill, 101 Mich. 393, 59 N. W. 661 (1894). Upon the termination of the contract for insurance the premium note becomes void: Mound City, etc., Ins. Co. v. Curran, 42 Mo. 374 (1868).

[87] Bacon v. Clyne, 70 Mich. 183, 38 N. W. 207 (1888).

as are necessary to meet the losses and expenses.[88] The facts necessary to authorize the assessment must be determined, and this must be made to appear affirmatively in an action brought by the receiver to enforce the assessment.[89] Such an assessment may include the amount necessary to cover the expenses of the receivership.[90]

§ 141. **Death during period of suspension.**—There can be no recovery for a loss which occurs during a period of suspension from membership,[91] but a member is protected during the period allowed by the contract for the payment of the assessment.[92] A payment after the death of the insured, which is accepted by the association without knowledge of the death, is of no effect.[93] But if such payment is accepted with full knowledge of all facts, it may render the association liable.[94]

§ 142. **Reinstatement.**—Contracts which provide for forfeiture or suspension for non-payment of dues generally contain a condition for reinstatement upon making payment and complying with certain requirements,[95] such as producing a certificate of good health.[96] The

[88] Tolford v. Church, 66 Mich. 431, 33 N. W. 913 (1887); In re Minneapolis, etc., Ins. Co., 49 Minn. 291, 51 N. W. 921 (1892). In this case the premium notes which constituted the "contingent fund" were a part of the capital of the company required by act of 1885.

[89] See Seamans v. Millers' Mut. Ins. Co., 90 Wis. 490, 63 N. W. 1059 (1895); In re Equitable, etc., Ass'n, 131 N. Y. 354 (1892).

[90] Davis v. Shearer, 90 Wis. 250, 62 N. W. 1050 (1895); Seamans v. Millers' Mut. Ins. Co., 90 Wis. 490, 63 N. W. 1059 (1895). For a statement of the general principles which must govern assessments on premium notes, see Swing v. H. C. Akeley L. Co., 62 Minn. 169, 64 N. W. 97 (1895).

[91] Blanchard v. Atlantic, etc., Ins. Co., 33 N. H. 9 (1856); Brown v. Grand Council, 81 Iowa 400, 46 N. W. 1086 (1890).

[92] Painter v. Industrial L. Ass'n, 131 Ind. 68, 30 N. E. 876 (1891) [ordinary life policy].

[93] Miller v. Union Cent. L. Ins. Co., 110 Ill. 102 (1884).

[94] Erdmann v. Mutual Ins. Co., 44 Wis. 376 (1878).

[95] Manson v. Grand Lodge, 30 Minn. 509 (1883). A lapsed policy can only be revived, so far as the insured is concerned, by the actual payment and acceptance of the premium, or by a contract based upon a sufficient consideration: Lantz v. Vermont L. Ins. Co., 139 Pa. St. 546, 10 L. R. A. 577 (1891), and cases therein cited.

[96] French v. Mutual, etc., Ass'n, 111 N. C. 391, 32 Am. St. 803 (1892); Jones v. Preferred, etc., Assur. Co., 120 Mich. 211, 79 N. W. 204 (1899). See note, 3 Am. St. 634.

acceptance of an assessment during the period of suspension, with a full knowledge of all facts, in itself reinstates a member.[97]

§ 143. **Waiver—Estoppel.**—The insurer may expressly or by implication waive strict compliance with the requirement that dues and assessments shall be paid within a specified time. The tendency of the courts is to protect the members of such associations from forfeiture of their rights. As said by the supreme court of Minnesota,[98] "The defendant had by its conduct led him to suppose and believe that a default of two or three months in any one payment would not affect his standing as a member, or his right and interest in the fund out of which his beneficiary would be paid in case of his decease. The defendant could not, after long continued conduct of this nature, by which he was lulled into the conviction that his delay was unobjectionable and his good standing unaffected, suddenly and without notice insist upon a forfeiture, and that he was no longer in good standing, and had forfeited all his rights and privileges." The court said that the general rule was that "if the company has, by its course of conduct, acts or declarations, misled the insured in any way in regard to the payment of premiums, or created a belief on the part of the insured that strict compliance with the letter of the contract as to the payment of the premiums on the day stipulated will not be exacted, and the insured, in consequence, fails to pay on the day appointed, the company will be held to have waived the requirement

[97] Sweetser v. Odd Fellows, etc., Ass'n, 117 Ind. 97, 19 N. E. 722 (1888).

[98] Mueller v. Grand Grove, 69 Minn. 236, 72 N. W. 48 (1897). In Sweetser v. Odd Fellows, etc., Ass'n, 117 Ind. 97 (1888), the court said: "It is quite true that mere occasional indulgence on the part of the insurance company, in the absence of an express or implied agreement to waive payment of the assessments according to the conditions of the contract, can not justly be construed as a permanent waiver or as depriving the company of the right to insist upon a forfeiture, or to cancel its policy on account of failure to pay according to the stipulations therein written. Thompson v. Insurance Co., 104 U. S. 252 (1881). But such a course of dealing may be shown as will estop the company to show that there was any agreement after it has permitted its policy to stand open and uncanceled after it has accepted payment of overdue premiums or assessments in a specified manner, which has been conformed to during the lifetime of the assured." See also Richwine v. LaCrosse, etc., Ass'n, 76 Minn. 417, 79 N. W. 504 (1899); Jones v. Preferred, etc., Assur. Co., 120 Mich. 211, 79 N. W. 204 (1899).

and is estopped from setting up the condition as a cause of forfeiture."

Where the constitution and by-laws of a mutual benefit association limit and define the powers of the officers and forbid the alteration or amendment of such constitution except by the governing body, in the manner therein provided, and the by-laws provide that the member must pay the assessment within a specified time, and no further or other notice need be given, it was held that the secretary could not waive such provisions.[99] There are numerous cases which hold that the officers of such a concern can not waive by-laws which relate to the substance of the contract.[100]

[99] Kocher v. Supreme Council (N. J.), 52 L. R. A. 861 (1901).

[100] McCoy v. Roman Cath., etc., Ins. Co., 152 Mass. 272, 25 N. E. 289 (1890); Niblack Mut. Ben. Soc. (2d ed.) 195.

PART V.

AGENCY, WAIVER AND ESTOPPEL.

CHAPTER VIII.

INSURANCE AGENTS AND THE GENERAL RULES OF AGENCY.

§ 150. **In general.**—In modern times almost all insurance is underwritten by corporations, which necessarily act through their officers and other agents. The powers and duties of the corporate officers are governed by the general law of corporations and agency, to which the reader is referred for a full discussion. In a large measure this is also true of the principles governing insurance agents; and in a work of the scope of the present volume it is only necessary to summarize these rules and refer to the statutory and other modifications affected by the nature of the contract and the conditions under which it is entered into. These general rules apply to agents of all kinds of insurance companies, and generally to individuals who are engaged in business as insurers.

As the words are commonly used, an insurance agent is a person employed by an insurance company to solicit risks and effect insur-

ance, collect and transmit premiums, and in general to represent the insurer in the solicitation, consummation and adjustment of the contract. It applies equally to one who represents the insured.[1]

§ 151. **Statutory provisions relating to insurance agents.**—The attempts of insurance companies to escape responsibility for the acts of their agents by inserting provisions in their applications and contracts limiting the powers of their agents, and providing that the person taking the application shall be regarded as the agent of the applicant, have led to the enactment of statutes defining who are insurance agents and determining their powers. These statutes provide that a local or traveling agent engaged in taking applications for insurance shall be deemed the agent of the insurer and as representing it, and not the insured, in connection with all statements made in the application.[2] It is also common to require insurance agents to procure a license, and in some instances it is made a criminal offense to solicit insurance without having such a license,[3] or to act as agent for an insurance company which has not procured a certificate of authority to do business within the state.[4] The business of insurance is of such a nature that the state may impose restrictions upon it, and, if thought advisable, prohibit individuals from engaging in it.[5] Where individuals are permitted to become insurers, the state may impose the same restrictions upon their agents as upon the agents of corporations engaged in the same business. It has been noted that foreign insurance corporations may be excluded from a state, or permitted to engage in business therein upon such conditions as the state chooses to impose. But individual citizens of other

[1] That the rule is the same in dealing with the agents of mutual and stock insurance companies, see Kausal v. Minnesota, etc., Ins. Co., 31 Minn. 17, 47 Am. Rep. 776 (1883); Whitney v. National, etc., Ass'n, 57 Minn. 472, 59 N. W. 943 (1894); Cumberland Valley, etc., Co. v. Schell, 29 Pa. St. 31 (1857); Franklin F. Ins. Co. v. Martin, 40 N. J. L. 568, 579 (1878).

[2] Vermont Rev. Laws 1880, § 3620; Iowa Rev. St. 1888, § 1732, quoted and commented on in McMaster v. New York L. Ins. Co., 78 Fed. 33 (1897); Bankers' L. Ins. Co. v. Robbins, 55 Neb. 117, 75 N. W. 585 (1898); Continental L. Ins. Co. v. Chamberlain, 132 U. S. 304 (1889). See also Continental Ins. Co. v. Ruckman, 127 Ill. 364, 11 Am. St. 121 (1889).

[3] See State v. Hosmer, 81 Me. 506 (1889).

[4] In re Hogan (N. Dak.), 78 N. W. 1051, 45 L. R. A. 166 (1899).

[5] Com. v. Vrooman, 164 Pa. St. 306, 25 L. R. A. 250 (1894).

states who are permitted to engage in the business of insurers may only be subjected to such restrictions and conditions as are imposed upon citizens of the same state of equal standing and merit.[6]

An insurance solicitor who places a risk through brokers in another state, without knowing by what company it was taken, is not relieved from liability under the statute authorizing the recovery of the loss from persons who act as agents of unlicensed foreign companies.[7]

§ 152. Construction of such statutes.—In Iowa it is provided that "any person who shall hereafter solicit insurance, or procure applications therefor, shall be held to be the soliciting agent of the insurance company or association issuing the policy on such application, or, on a renewal thereof, anything in the application or policy to the contrary notwithstanding."[8] This act was held to apply to all kinds of insurance,[9] and to be intended to settle, as between the parties to the contract, the *status* of the party through whom negotiations are conducted. Its object was to cut out the class of defenses interposed under the provisions which many companies inserted in their applications and policies, to the effect that the agent by whom the application was procured should be regarded as the agent of the insured.[10] The supreme court of the United States held[11] that by force of this statute a person procuring an application for life insurance is the agent of the company, and can not be converted into the agent of the insured by any provision in the application. Such an agent is under no obligation to aid in filling out an application, and if he does so and gives advice as to the character of the answers given, his acts are the acts of the company.

[6] State v. Stone, 118 Mo. 338, 25 L. R. A. 243 (1893). As to restrictions upon insurance by unincorporated associations from another state, see note, 25 L. R. A. 238.

[7] Noble v. Mitchell, 100 Ala. 519, 25 L. R. A. 238 (1893).

[8] Iowa Laws 1880, ch. 211. By Minn. Laws 1895, ch. 175, § 88, such agent is made the agent of the company for the purpose of receiving the premium. Section 25 provides that "any person who solicits insurance and procures the application therefor shall be held to be the agent of the party thereafter issuing the policy upon such application, or a renewal thereof, anything in the application or policy to the contrary notwithstanding." Similar provisions are found in other states.

[9] Cook v. Federal Life Ass'n, 74 Iowa 746 (1887).

[10] St. Paul, etc., Ins. Co. v. Sharer, 76 Iowa 282 (1888).

[11] Continental Ins. Co. v. Chamberlain, 132 U. S. 304 (1889).

§ 153. **Evidence of agency.**—The fact and character of the agency may be shown by any competent evidence; such as an express contract between the agent and his principal, the holding out or recognition of the party as his agent,[12] the possession of papers such as policies executed in blank, which an insurance company would furnish ordinarily only to its agents;[13] and generally by the existence of a state of facts from which agency would be inferred as a matter of law,[14] or as a mixed question of law and fact.[15] Thus, a person soliciting insurance and taking the application, in the absence of notice to the insured of limitations upon his authority, will be deemed the agent of the company which accepts the application, issues the policy and retains the premium.[16] But an agent's apparent authority to bind his principal must be based on something tangible; such as the possession by the agent of blank policies signed by the officers of the company, or some other act of the company, such as permitting the party to continue business after it has notice that he is representing himself as its agent.[17]

§ 154. **Character of the agency.**—The nature of the agency in each case depends upon the terms of the employment and the character of the business to be transacted. As between the principal and the agent, or the principal and persons dealing with the agent, with

[12] List v. Commonwealth, 118 Pa. St. 322, 328 (1888); Enos v. St. Paul, etc., Ins. Co., 4 S. Dak. 639, 46 Am. St. 796 (1894); Parker v. Citizens' Ins. Co., 129 Pa. St. 583 (1889) [affidavit of alleged agent used in litigation]; Schreiber v. German-Amer., etc., Ins. Co., 43 Minn. 367 (1890) [admission by president of company]. A company which has ratified the acts of a person in writing an application for insurance, by accepting it and issuing a policy thereon, can not thereafter repudiate such acts because the agent had not a written certificate of appointment: Landes v. Safety, etc., Ins. Co., 190 Pa. St. 536, 42 Atl. 961 (1899). When the company issues a policy upon an application taken by a solicitor, it is estopped to deny his agency: London, etc., Ins. Co. v. Gerteisen (Ky.), 51 S. W. 617 (1899).

[13] Possession of blanks as evidence, see Dickerman v. Quincy, etc., Ins. Co., 67 Vt. 609 (1895).

[14] Sellers v. Commercial F. Ins. Co., 105 Ala. 282 (1894); Indiana Ins. Co. v. Hartwell, 123 Ind. 177 (1889); Duluth Nat. Bank v. Knoxville F. Ins. Co., 85 Tenn. 76, 4 Am. St. 744 (1886); Allen v. German-Amer. Ins. Co., 123 N. Y. 6 (1890).

[15] Lumbermen's Mut. Ins. Co. v. Bell, 166 Ill. 400, 57 Am. St. 140 (1897). See Davis v. Ætna, etc., Ins. Co., 67 N. H. 335 (1892).

[16] London, etc., Ins. Co. v. Gerteisen (Ky.), 51 S. W. 617 (1899). See § 160, *infra*.

[17] Bell v. Peabody Ins. Co. (W. Va.), 38 S. E. 541 (1901).

knowledge of the terms of employment, such terms are conclusive. But the agent may exceed his actual authority under such circumstances as will justify persons dealing with him without knowledge of limitations on his authority in assuming that he has greater authority than is in fact the case as between the agent and his principal. One who has no knowledge of limitations may assume that an agent has power to bind his principal within the scope of his apparent authority.

Insurance agents are known by various designations, such as general, special and soliciting, which in a rough way describe the powers which are conferred upon them. Lord Ellenborough defined a general agency as one which arises from general employment, while a special agency is confined to and constituted by the authority delegated in that particular instance. Judge Story said that "a special agency properly exists when there is a delegation of authority to do a single act, and a general agency, where there is a delegation to all acts connected with a particular trade, business or employment. Hence, a general agent is one who is employed to transact all the business of his principal of a particular kind or in a particular place, while a special agent is one authorized to act only in a specific transaction."[18] It is doubtful whether the distinction is of much practical value, as the relation of the agent to third parties is controlled ordinarily by what the person dealing with the agent has a right under the circumstances to assume from the nature and scope of the agent's employment.[19] The distinction between general and special insurance agents has been abolished by the statutes of some states. Thus, in Wisconsin, the agents of insurance companies, without reference to attempted limitations, have power to do almost anything that their companies could do. The statute gives all insurance agents general powers; and it was held that an agent might make a valid oral agreement for immediate insurance, notwithstanding a stipulation in the application,

[18] See Whitehead v. Tuckett, 15 East 400 (1812); Story Agency (1882), § 17; Ewell's Evans Agency 2; Dunlop's Paley Agency (1856) 2. That the nature of the agency is not affected by the fact that it is restricted to a particular locality, see Continental, etc., Ins. Co. v. Ruckman, 127 Ill. 364, 11 Am. St. 21 (1889), where the court said: "W and S, though representing their principal in a particular locality, or within a limited territory, and therefore called local agents, were in fact general agents of the defendant in the matter of issuing policies."

[19] See Gore v. Canada L. Assur. Co., 119 Mich. 136, 77 N. W. 650 (1898).

which was subsequently signed by the applicant without actual knowledge of its contents, that the insurer should not be liable until the application and premium were received by the secretary. The court said: "All the insurance companies understand that all their agents doing business in this state are general agents, however restricted their powers may be by the rules of the companies, or by the stipulations of their policies, or by the applications for insurance."[20]

§ 155. **Various special agents.**—A person who deals with a general agent may assume that he has authority co-extensive with his apparent authority. But if the circumstances are such as to show that the authority is limited and special, the person dealing with him is under obligation to learn the extent of such limitations.[21] There is considerable conflict of authority as to the powers of a soliciting agent who has actual authority merely to receive applications and forward them to the company for approval. It has been held that such an agent can not bind the company by an oral contract of insurance,[22] or for the renewal of a policy,[23] or for additional insurance,[24] or by his construction of the policy;[25] nor can he consent to

[20] Wis. Rev. Stat., § 1977; Mathers v. Union, etc., Ass'n, 78 Wis. 588, 11 L. R. A. 83 (1891).

[21] As to the circumstances under which the applicant must ascertain the agent's authority, see Sun Fire Office v. Wich, 6 Colo. App. 103, 39 Pac. 587 (1894). The mere fact that a person is the representative of the insurer for a certain purpose, such as the making of a medical examination, does not justify the inference that he has authority to represent the company in other matters, such as the filling out of the application for insurance: Flynn v. Equitable L. Assur. Soc., 67 N. Y. 500 (1876). The medical examiner is the agent of the company in making the examination, although the application recites that he shall be regarded as the agent of the applicant: Knights of Pythias v. Cogbill, 99 Tenn. 28 (1887). The local agent of a life insurance company is in the discharge of no duty which he owes his company when he is present at the medical examination of an applicant. He can not therefore bind the company by his advice as to the proper answer to a question as to whether the applicant has ever been rejected as an applicant for insurance in other companies: U. S. L. Ins. Co. v. Smith, 92 Fed. 503, 34 C. C. A. 506 (1899).

[22] O'Brien v. New Zealand Ins. Co., 108 Cal. 227 (1895); Fleming v. Hartford F. Ins. Co., 42 Wis. 616 (1877).

[23] Shank v. Glens Falls Ins. Co., 4 N. Y. App. Div. 516 (1896). In this case the powers of the agent were clearly limited by the policy.

[24] Heath v. Springfield, etc., Ins. Co., 58 N. H. 414 (1878).

[25] Dryer v. Security F. Ins. Co., 94 Iowa 471 (1895).

the assignment of the policy,[26] or waive a condition therein.[27] A mere collecting agent can not bind the company by an agreement to waive any of the terms of the policy.[28] So, it has been held that an agent with authority to adjust a loss can not waive a forfeiture of the policy,[29] although he may waive the making of preliminary proofs of loss.[30]

§ 156. Sub-agents and clerks.—Although the recent authorities upon the power to delegate authority to sub-agents and clerks have been subjected to some criticism, the rule is well established that the insurer is liable not only for the acts of his general agent, but also for the acts of the clerks and employes of such agent to whom he has delegated authority to discharge his functions within the scope of his agency.[31] It was said in a recent case[32] that "insurance companies know, or ought to know, when they appoint general agents, that, according to the ordinary course of business, they have clerks and other persons who assist them, and that their agents in many instances could not transact the business intrusted to them if they were required to give their personal attention to all its details. It being necessary, therefore, and according to the usual course of business, for their agents to employ others to aid them in doing the work, it is just and

[26] Strickland v. Council Bluffs Ins. Co., 66 Iowa 466 (1885).

[27] As to proof of loss, see Lohnes v. Ins. Co., 121 Mass. 439 (1877); Bowlin v. Hekla F. Ins. Co., 36 Minn. 433 (1887).

[28] Bryan v. National L. Ins. Ass'n, 21 R. I. 149, 42 Atl. 513 (1899).

[29] Hollis v. State Ins. Co., 65 Iowa 454 (1884).

[30] Ætna Ins. Co. v. Shryer, 85 Ind. 362 (1882). The contract of an agent sent to adjust a loss is binding upon the company in the absence of notice to the insured of any limitation upon the authority of such adjuster: Slater v. Capital Ins. Co., 89 Iowa 628, 23 L. R. A. 181 (1894). See also Faust v. American F. Ins. Co., 91 Wis. 158, 30 L. R. A. 783 (1895); Dick v. Merchants' Ins. Co., 92 Wis. 46, 65 N. W. 742 (1896).

[31] Steele v. German Ins. Co., 93 Mich. 81, 18 L. R. A. 85 (1892); Swain v. Agricultural Ins. Co., 37 Minn. 390 (1887); Indiana Ins. Co. v. Hartwell, 123 Ind. 177 (1889). In some cases it is said that the power of the principal can not be delegated to a sub-agent without actual or implied authority. See Phœnix Ins. Co. v. Spiers, 87 Ky. 285 (1888); Waldman v. North British, etc., Ins. Co., 91 Ala. 170, 24 Am. St. 883 (1890). But, as stated in the cases above cited, the authority may easily be implied from the circumstances.

[32] Goode v. Georgia Home Ins. Co., 92 Va. 392, 30 L. R. A. 842 (1895); Deitz v. Providence Wash. Ins. Co., 33 W. Va. 526 (1890).

reasonable that insurance companies should be held responsible not only for the acts of the agents, but also for the acts of their agents' employes within the scope of the agents' authority. It is no sufficient answer to this view to say that the insurers did not authorize their agents to delegate their authority to others. It may be that they did not do so expressly, but they appointed agents whom they knew, or ought to have known, would, according to the usage or the necessities of the business, engage the services of others in doing the work intrusted to them; and, having this knowledge, they will be held to have impliedly authorized their agents to do what was usual or necessary in the business."

An insurance agent may, therefore, employ a clerk and authorize him to contract for risks, to deliver policies and make renewals, collect premiums and give credit therefor by waiving prepayment.[33] Where a policy contained a provision that "only such persons as shall hold a commission from this company shall be considered as its agents in any transaction relating to this insurance," it was held that notice of other insurance given a clerk or employe of a commissioned agent was notice to the company.[34] So, notice to a clerk of the insurer's agent of the condition of the insured's title is notice to the company.[35]

§ 157. **Insurance brokers.**—An insurance broker must be distinguished from an ordinary agent.[36] He is generally the agent of the insured, and may hence bind him by his concealments and representations made in the course of the negotiation.[37] A broker is

[33] Bodine v. Exchange F. Ins. Co., 51 N. Y. 117, 10 Am. Rep. 566 (1872).

[34] Arff v. Star F. Ins. Co., 125 N. Y. 57, 10 L. R. A. 609 (1890).

[35] Carpenter v. German-Amer. Ins. Co., 135 N. Y. 298 (1892).

[36] Gude v. Exchange F. Ins. Co., 53 Minn. 220 (1893); Bernheimer v. City of Leadville, 14 Colo. 518 (1890).

[37] In John R. Davis L. Co. v. Hartford F. Ins. Co., 95 Wis. 226, 37 L. R. A. 131 (1897), Mr. Justice Marshall said: "Leaving out of view the statute, what the powers of an insurance broker are can hardly be a subject for serious controversy. He is the agent for the assured, according to all the authorities on the subject, though at the same time, for some purposes, he may be the agent for the insurer, and his acts and representations within the scope of his authority as such agent are binding upon the insured: Mechem Agency, § 931; Hartford F. Ins. Co. v. Reynolds, 36 Mich. 502 (1877); Standard Oil Co. v. Triumph Ins. Co., 64 N. Y. 85 (1876); Hamblet v. City Ins. Co., 36 Fed. 118 (1888); American F. Ins. Co. v. Brooks, 83 Md. 22 (1896). Questions involving the scope of the powers of an insurance broker to

defined as a person who, "for compensation, acts or aids in any manner in the negotiation of contracts of insurance or reinsurance, or placing risks or effecting insurance or reinsurance, for a person other than himself, and not being the appointed agent or officer of the company in which such insurance or reinsurance is effected."[38] It must be determined from the facts of each case whether the broker represents the insured or the insurer, or each for certain purposes. If he is employed by the insurer he is, of course, its agent.[39] But the mere fact that he solicits the insurance from the insured, and receives a commission from the company which delivers the policy to the insured, does not make him the agent of the company.[40] The broker may be the agent of one party for one purpose and of the other for another purpose. In Indiana he is said to be the agent of the company for the purpose of delivering the policy and receiving the premium.[41] In Texas he is its agent to collect premiums only;[42] and this is the rule by statute in Massachusetts.[43] In Pennsylvania[44] he is not the agent of the insurer even for this purpose. A broker who is employed only to secure a policy can not, by virtue of such employment, represent his employer in other matters relating to the insurance. His agency ceases when the policy is procured, and he can not thereafter cancel the policy, and his principal is not affected by

represent the insured arise most frequently where notice of cancellation is served by the insurer on such broker when the contract of insurance requires it to be served upon the insured. In such case the question turns on whether the employment of the broker extended beyond the mere procurement of the insurance. If not, it is held that his agency ceased upon the delivery and acceptance of the policy, so that the service of notice of cancellation upon him was ineffectual. But the broker may be so clothed with authority as to have full power to act for the insured in canceling, as well as procuring policies. In all cases the familiar rule respecting the relation of principal and agent applies,—that within the scope of his authority to procure insurance he stands in the place of the principal, and the latter is bound by whatever, within such scope, such agent may do, to the same extent as if it was done by the principal."

[38] Mass. Laws 1887, ch. 214, § 93.

[39] See Newark F. Ins. Co. v. Sammons, 110 Ill. 166 (1884).

[40] Seamans v. Knapp, 89 Wis. 171, 27 L. R. A. 362 (1895).

[41] Indiana Ins. Co. v. Hartwell, 123 Ind. 177 (1889). To same effect is Hermann v. Niagara F. Ins. Co., 100 N. Y. 411 (1885).

[42] East Texas F. Ins. Co. v. Blum, 76 Tex. 653 (1890).

[43] See Davis v. Ætna, etc., Ins. Co., 67 N. H. 335 (1892).

[44] Pottsville, etc., Ins. Co. v. Minnequa Springs, etc., Co., 100 Pa. St. 137 (1882).

notice of cancellation or of other matters relating to the risk.[45] The delivery of the policy to a broker, employed by the insured to procure it, is a delivery to the insured.[46] Where a company issues policies upon representations of brokers assuming to act for it, and, in pursuance of business methods customary between them, without any communication with the insured, the broker will be held to be the agent of the insurer, although the policy provides that no person, unless duly authorized in writing, shall be deemed its agent.[47]

§ 158. **Powers of agents.**—An agent may bind his principal when acting within the scope of his authority, and his power is determined not alone by the actual, but also by the apparent or ostensible authority. The latter is such as a principal, intentionally or by want of ordinary care, allows a third person to believe the agent to possess.[48] A general agent can bind his principal by any act within the ordinary scope of the business.[49] His acts are the acts of the principal, and he may hence waive a condition in a policy which his principal could waive,[50] correct a misdescription of the property in the policy,[51] and do other such things, subject always to the provision that his powers may legally be limited, if such limitations are known to the persons who deal with him. But secret instructions, in derogation of the ordinary powers which the public may properly assume to be possessed by such agents, are ineffectual.[52]

[45] Hermann v. Niagara F. Ins. Co., 100 N. Y. 411, 53 Am. Rep. 303 (1885).

[46] Holmes v. Thomason (Tex. Civ. App.), 61 S. W. 504 (1901).

[47] The insured had no knowledge of the actual relations between the company and the broker: McElroy v. British Amer. Assur. Co., 94 Fed. 990, 36 C. C. A. 615 (1899).

[48] Ins. Co. v. Wilkinson, 13 Wall. (U. S.) 222 (1871); O'Brien v. New Zealand Ins. Co., 108 Cal. 227 (1895); Viele v. Germania Ins. Co., 26 Iowa 9 (1868); California Ins. Co. v. Gracey, 15 Colo. 70, 22 Am. St. 376 (1890).

[49] Croft v. Hanover F. Ins. Co., 40 W. Va. 508, 52 Am. St. 902 (1895).

[50] Ins. Co. v. Norton, 96 U. S. 234 (1877). An agent of an insurance company acting within the scope of his authority may, upon notice of a breach of condition contained in a policy of insurance, waive the company's right to take advantage of a forfeiture: Home F. Ins. Co. v. Kuhlman, 58 Neb. 488, 78 N. W. 936 (1899). It is immaterial what the agent is called so long as he is acting within the scope of his authority.

[51] Taylor v. State Ins. Co., 98 Iowa 521, 60 Am. St. 210 (1896).

[52] Hall v. Union, etc., Ins. Co. (Wash.), 51 L. R. A. 288 (1900).

§ 159. **Restrictions in application or policy.**—The early cases holding the insurance companies to strict responsibility for acts of their soliciting agents led to the insertion in applications and policies of numerous provisions whereby it was sought to make the insured bear the burden of the agent's misconduct. As a result, their policies became shingled over with stipulations that were practically deceptions.[53] Had full force and effect been given to all these provisions, a policy of insurance would have been simply a unilateral contract, with an option to perform on the part of the company. But as the companies became astute in contriving such provisions, courts were careful to see that they were not used as the instruments of fraud and injustice. Out of this condition there grew a mass of hopelessly conflicting decisions which can not be reconciled on any theory other than the desire of the courts to do justice in the particular case. In many states this has been remedied by the enactment of statutes declaring the powers and duties of agents of insurance companies and prescribing the form of policy which must be used. Where these statutes exist, they are, of course, controlling.

The effectiveness of such restrictive provisions depends largely upon whether the applicant for insurance has knowledge of their existence. Where the limitation is inserted in the application, which is signed by the applicant, he is generally held bound by notice of its existence,[54] although in some cases this is held not conclusive.[55]

Such limitations may be ineffectual in the particular case because not regarded as notice to the applicant, or because waived by the company or its authorized agent, or because by its conduct the company has estopped itself from asserting the defense. In considering the power of an agent it is necessary to bear in mind the distinction between acts which are connected with the procuring of the insurance and those which relate to the modification or waiver of conditions in the policy which relate to the future.

Where the policy contained a provision that the company "shall not be bound * * * by any act or statement made * * * by any agent * * * which is not authorized by this policy or con-

[53] See the tirade against insurance companies by Chief Justice Doe of New Hampshire in DeLancey v. Ins. Co., 52 N. H. 581 (1873).

[54] New York L. Ins. Co. v. Fletcher, 117 U. S. 531 (1886); Ryan v. World, etc., Ins. Co., 41 Conn. 168, 16 Am. Rep. 490 (1874).

[55] See State Ins. Co. v. Gray, 44 Kan. 731 (1890); Tubbs v. Dwelling-House Ins. Co., 84 Mich. 646 (1891).

tained therein, or in any written paper mentioned herein," the power can only be exercised in the mode prescribed, "unless it is shown that the agent possessed actually or apparently the power of his principal in respect to the provisions alleged to have been waived."[56] In line with this it was said in a case where it was claimed that the agent had waived a provision requiring prompt payment of a premium note, that "the written agreement of the parties, as embodied in the policy and the indorsement thereon, as well as the notes and the receipts given therefor, was undoubtedly to the express purport that a failure to pay the note at maturity would incur a forfeiture of the policy. It also contained an express declaration that the agents of the company were not authorized to make, alter or abrogate contracts or waive forfeitures. And these terms, had the company so chosen, it could have insisted on. But a party always has the option to waive a condition or stipulation made in his own favor. The company was not bound to insist upon a forfeiture, though incurred, but might waive it. It was not bound to act upon the declaration that its agent had not power to make agreements or waive forfeitures, but might at any time give them such power. The declaration was only tantamount to a notice to the assured, which the company could waive and disregard at pleasure. In either case, both with regard to the forfeiture and the powers of its agent, a waiver of the stipulation or notice would not be repugnant to the written agreement, because it would only be the exercise of an option which the agreement left in it. And whether it did exercise such option or not was a fact provable by parol evidence as well as by writing, for the obvious reason that it could be done without writing."[57]

§ 160. **Limitations on authority of agent.**—As between the principal and the agent, the authority of the agent may be limited in any manner thought desirable by the principal, and such limitations will be given full force and effect as against all persons who have knowledge of their existence. But undisclosed instructions which are contrary to the natural, ordinary and ostensible powers possessed by such agent are not binding upon those who have neither actual nor constructive notice of their existence. It is generally held that the

[56] Messelback v. Norman, 122 N. Y. 578 (1890).

[57] Insurance Co. v. Norton, 96 U. S. 234 (1877).

insured will be deemed to have notice of limitations which are contained in the application which he signs.[57a]

§ 160a. Limitations on authority—Continued.—Some courts refuse to give effect to a provision in the policy limiting the power of the company's agent,[58] while others treat it as a stipulation by which the assured, by accepting the policy, agrees to be bound.[59] In Wisconsin it was said[60] that "when the assured has accepted a policy containing a clause prohibiting the waiver of any of its provisions by the local agent he is bound by such inhibition, and that any subsequently attempted waiver merely by virtue of such agency is a nullity. This proposition seems to be supported by the weight as well as the logic of the adjudicated cases." Provisions in a policy which restrict the future power of the agent by prescribing the manner in which he can act are generally sustained.[61] The tendency is to hold that such

[57a] New York L. Ins. Co. v. Fletcher, 117 U. S. 531 (1886), and cases cited; Ruggles v. American Cent. Ins. Co., 114 N. Y. 415 (1889); Hall v. Union, etc., Ins. Co. (Wash.), 51 L. R. A. 288 (1900).

[58] The local agent of an insurance company, who is authorized to make contracts of insurance, issue policies, and receive premiums therefor, and is clothed with all the authority of his principal with respect thereto, may waive a forfeiture of a policy under a provision that it shall be void if foreclosure proceedings are commenced, notwithstanding that the policy provides that the agent who issues the policy shall not have power to waive, modify, or revive the same: Springfield, etc., Co. v. Traders' Ins. Co., 151 Mo. 90, 52 S. W. 238 (1899).

[59] Enos v. Sun Ins. Co., 67 Cal. 621 (1885); Cleaver v. Traders' Ins. Co., 65 Mich. 527, 32 N. W. 660 (1887); Burlington Ins. Co. v. Gibbons, 43 Kan. 15, 22 Pac. 1010 (1890); Weidert v. State Ins. Co., 19 Ore. 261, 24 Pac. 242 (1890); Greene v. Lycoming F. Ins. Co., 91 Pa. St. 387 (1879); Greenwood v. New York L. Ins. Co., 27 Mo. App. 401 (1887); Equitable Ins. Co. v. Cooper, 60 Ill. 509 (1871); Zimmerman v. Home Ins. Co., 77 Iowa 685, 42 N. W. 462 (1889); Clevenger v. Mutual L. Ins. Co., 2 Dak. 114 (1878); Walsh v. Hartford F. Ins. Co., 73 N. Y. 5 (1878). An agent of an insurance company who is only authorized to solicit and take applications for insurance, receive the premiums, and deliver the policies, which have been signed by the proper officers, has no authority, either express or implied, to waive a breach of the stipulation in the policy that subsequent additional insurance shall not be effected on the property without the consent of the underwriter: Alabama, etc., Assur. Co. v. Long, etc., Co. (Ala.), 26 So. 655 (1899).

[60] Hankins v. Rockford Ins. Co., 70 Wis. 1, 35 N. W. 34 (1878), citing many cases.

[61] Kyte v. Commercial U. Assur. Co., 144 Mass. 43 (1887); Behler v. German, etc., Ins. Co., 68 Ind. 347

provisions are binding on the assured only in respect to such matters as occur after the delivery of the policy. In a leading case Mr. Justice Mitchell forcibly said:[62] "It would be a stretch of legal principles to hold that a person dealing with an agent, apparently clothed with authority to act for his principal in the matter in hand, could be affected by notice, given after the negotiations were completed, that the party with whom he had dealt should be deemed transformed from the agent of one party into the agent of the other. To be efficacious, such notice should be given before the negotiations are completed. The application precedes the policy, and the insured can not be presumed to know that any such provision will be inserted in the latter. To hold that by a stipulation unknown to the insured at the time he made the application, and when he relied upon the fact that the agent was acting for the company, he could be held responsible for the mistakes of such agent would be to impose burdens upon the insured which he never anticipated. Hence we think that if the agent was the agent of the company in the matter of making out and receiving the application, he can not be converted into the agent of the insured by merely calling him such in the policy subsequently issued; neither can any mere form of words wipe out the fact that the insured truthfully informed the insurer through its agent of all matters pertaining to the application at the time it was made. We are aware that in so holding we are placing ourselves in conflict with the views

(1879); Wilkins v. State Ins. Co., 43 Minn. 177 (1890); O'Brien v. Prescott Ins. Co., 134 N. Y. 28, 31 N. E. 265 (1892); Hartford F. Ins. Co. v. Small, 66 Fed. 490, 14 C. C. A. 33 (1895); Gould v. Dwelling-House Ins. Co., 90 Mich. 302, 51 N. W. 455 (1892); Marvin v. Universal L. Ins. Co., 85 N. Y. 278 (1881); Smith v. Niagara F. Ins. Co., 60 Vt. 682, 1 L. R. A. 216 (1888); Knudson v. Hekla F. Ins. Co., 75 Wis. 198, 43 N. W. 954 (1889); Quinlan v. Providence Wash. Ins. Co., 133 N. Y. 356, 31 N. E. 31 (1892).

[62] Kausal v. Minnesota, etc., Ins. Ass'n, 31 Minn. 17, 47 Am. Rep. 776 (1883). See also Boetcher v. Hawkeye Ins. Co., 47 Iowa 253 (1877). A clause in a policy withholding from agents authority "to make, alter or discharge this or any other contract in relation to the matter of this insurance" has no relation to the application which precedes the policy. "This provision of the policy does not take effect until the application is made and accepted and the policy is issued. Its relation to the policy and other completed contracts concerning the insurance has no reference to the application which precedes the policy, and which, until it is accepted and the policy issued, is a mere offer or proposition for a contract of insurance:" Mutual, etc., Ins. Co. v. Robison, 58 Fed. 723, 22 L. R. A. 325, 7 C. C. A. 444 (1893).

of some eminent courts. But the conclusion we have reached is not without authority to sustain it, and is, as we believe, sound in principle and in accordance with public policy."

§ 161. Limitations contained in application—Constructive notice.—While the courts should not give effect to a provision in the application which attempts to limit the authority of the agent, when it appears that the applicant was in any way misled, there seems to be no good reason why the company should not be permitted to prohibit its agent from acting as the amanuensis of the applicant. When there is no statute regulating the matter, and the applicant has knowledge of the limitations, he is bound thereby. A person who signs a written statement should know its contents or be able to give an excuse for his ignorance other than his own negligence. The application signed by the applicant is ordinarily, and often by statute required to be, attached to the policy,[63] and thus is delivered to the insured, who has an opportunity to become acquainted with its contents. If the statements in the application are incorrect, he should make the fact known to the company within a reasonable time, or be estopped from thereafter asserting it.[64] But some courts do not hold the applicant bound to know the contents of the application and policy. In Pennsylvania it was said[65] that the law does not, in anticipation of a fraud upon the part of the company, impose upon the assured an absolute duty to read its policy when he receives it, although it was suggested that it would certainly have been an act of prudence on his part to do so. Notwithstanding this, "one thing is certain, however—the company can not repudiate the fraud of its agent and thus escape the obligations of a contract consummated thereby, merely because the insured accepted in good faith the act of the agent without examination." The supreme court of the United States recognizes the doctrine that when an insurance agent who is not limited in his authority, or when such limitation is not known to the insured, undertakes to prepare an application and writes the answers for the applicant, he is acting for the company. But when such limitation is embodied in

[63] As by Mass. Laws 1894, ch. 120; Iowa Code, §§ 1741, 1819, 1826. In Michigan a copy of the application must be attached to the policy when requested by insured: Laws 1899, ch. 87.

[64] Ryan v. World, etc., Ins. Co., 41 Conn. 168 (1874); Reynolds v. Atlas Acc. Ins. Co., 69 Minn. 93, 71 N. W. 831 (1897).

[65] Kister v. Lebanon, etc., Ins. Co., 128 Pa. St. 553, 5 L. R. A. 646 (1889).

the application, which is signed by the insured, he must be presumed to have read it, and is therefore bound by its contents.[66]

When the application is prepared by a general agent having no superior in the state, the question of limitations upon the agent's authority does not arise; and the company is bound by all answers written by the agent, although the application is attached to the policy and delivered to the insured.[67]

§ 162. **Preparation of application.**—An agent who is authorized to receive applications for insurance represents the insurance company in all he does in connection with the preparation of the application, and if he receives truthful information from the insured, and undertakes to fill out the application and inserts false or incorrect answers, his act is that of the company and not of the applicant. This rule is established by statute in many states, and is generally adopted even where no statutes are in existence.[68]

§ 163. **Provisions restricting power of officers and general agents.**—A company can not, by a provision in its policy, restrict its power to act through its officers or general agents. Thus, a provision that the terms of the policy can not be waived or changed by any "officer or agent of the company" except in writing is invalid in so far as it attempts to restrict the power of the company as well as its agent.[69] This principle applies to a general agent as well as an

[66] New York L. Ins. Co. v. Fletcher, 117 U. S. 519 (1886); Maier v. Fidelity, etc., Ass'n, 47 U. S. App. 322 (1897), per Harlan, J. See Fireman's Fund Ins. Co. v. Norwood, 69 Fed. 71, 16 C. C. A. 136 (1895). That the insured may, under certain circumstances, be excused from reading the policy,—see McMaster v. New York L. Ins. Co. (U. S.), 22 Sup. Ct. 10 (1901).

[67] Michigan, etc., Ins. Co. v. Leon, 138 Ind. 636, 37 N. E. 584 (1894).

[68] Bartholomew v. Merchants' Ins. Co., 25 Iowa 507, 96 Am. Dec. 68 (1868), per Dillon, C. J.; Ins. Co. v. Wilkinson, 13 Wall. (U. S.) 222 (1871); Ins. Co. v. Mahone, 21 Wall. (U. S.) 152 (1874); Kausal v. Minnesota, etc., Ins. Ass'n, 31 Minn. 17, 47 Am. Rep. 776, and note, 20 L. R. A. 277 (1883); Messelback v. Norman, 122 N. Y. 578 (1890). "In writing the application, and in explaining the interrogatories and the meaning of the terms used, he is to be regarded as the agent of the company:" Ryan v. World, etc., Ins. Co., 41 Conn. 168 (1874). But the court refused to go further and hold the company responsible for false statements written by the agent, as such authority could not by any possibility have been contemplated as within the scope of the agency. But see Allen v. German-Amer. Ins. Co., 123 N. Y. 6 (1890).

[69] Lamberton v. Connecticut F.

officer of the corporation; as whatever the company can lawfully do can be done by its duly authorized agent. Where a policy provided that its provisions could not be waived by the president and secretary, the court said:[70] "This provision may be modified by the company to the same extent as any other, and whatever the company can do can be done by the general agent." In Wisconsin it was said:[71] "We must hold, however, that such attempted restrictions upon the power of the company or its general officers or agents, acting without the scope of their general authority, to subsequently modify the contract and bind the company in a manner contrary to such previous conditions in the policy, are ineffectual." So, in New York it is said:[72] "Notwithstanding the provisions of the policy, that anything less than a specific agreement clearly expressed and indorsed on the policy should not be considered as a waiver of any printed or written conditions therein, the court recognized and affirmed the law, as settled in this state, that such condition can be dispensed with by the company or its general agent by oral consent as well as by writing."

§ 164. **Notice.**—The doctrine by which a principal is charged with knowledge of facts of which his agent has notice is thus stated by Mr. Justice Story:[73] "Notice of facts to an agent is constructive notice thereof to the principal himself when it arises from or is connected with the subject-matter of his agency; for, upon general principles of public policy, it is presumed that the agent has communicated such facts to his principal, and if he has not, still, the principal having intrusted the agent with the particular business, the other party has the right to deem his acts and knowledge obligatory upon the principal; otherwise the neglect of the agent, whether designed or undesigned, might operate most injuriously to the rights and interests of such party."

Ins. Co., 39 Minn. 129 (1888); Ruthven v. American F. Ins. Co., 92 Iowa 316, 60 N. W. 663 (1894).

[70] German Ins. Co. v. Gray, 43 Kan. 497, 8 L. R. A. 70 (1890).

[71] Renier v. Dwelling-House Ins. Co., 74 Wis. 89 (1889), and cases therein cited.

[72] Weed v. London, etc., Ins. Co., 116 N. Y. 117 (1889).

[73] Story Agency, § 140. See also Eagle Fire Co. v. Globe, etc., Co., 44 Neb. 380, 62 N. W. 895 (1895); Gans v. St. Paul, etc., Ins. Co., 43 Wis. 108 (1877); Forward v. Continental Ins. Co., 142 N. Y. 382 (1894); Phenix Ins. Co. v. Stocks, 149 Ill. 319 (1894); Mesterman v. Home., etc., Ins. Co., 5 Wash. 524, 34 Am. St. 877 (1893).

In some states the statute provides that where a company issues a policy "upon an application prepared by a third person, assuming to act as its agent or otherwise, it shall be charged with his knowledge of facts relating to the property insured, as they were stated in the application."[74] Hence, where a policy is issued by an agent who has knowledge of other insurance on the property, his knowledge is the knowledge of the company, and it is estopped to assert that consent to the concurrent insurance was not given in writing.[75] So, where true information is given to the agent with reference to matters inquired about, his knowledge is the knowledge of the company, and it is immaterial that the agent did not correctly write the answers.[76] So, the knowledge of the agent that the applicant for life insurance has made a false statement,[77] or that he is intemperate, or has some disease, has been held to be the knowledge of the company and made the basis of waiver or estoppel.[78] Generally, where there is no written application containing representations and warranties, the company is charged with a knowledge of the risk obtained by its agent through his own inquiries and investigations.[79]

A company which gives to an agent the supervision and inspection of its risks is charged with knowledge of all the facts with reference to the risk learned by the agent while engaged in the performance of his duties.[80] But a person who is employed to procure insurance upon certain property, and who applies to the general agents of several companies for policies, and, after receiving them, collects the premiums and pays the general agents the amounts claimed by them, is not the agent of the insurers, so as to charge them with his knowledge as to the existence of other policies.[81] So, an insurance company, by making a person its agent to deliver a policy, does not become chargeable with knowledge obtained by him while acting as agent of the insured

[74] See New Hampshire Laws 1885, ch. 170.

[75] Phenix Ins. Co. v. Covey, 41 Neb. 724, 60 N. W. 12 (1894); Home F. Ins. Co. v. Hammang, 44 Neb. 566, 62 N. W. 883 (1895), citing many cases.

[76] Ins. Co. v. Wilkinson, 13 Wall. (U. S.) 232 (1871); Mutual Ben. L. Ins. Co. v. Robison, 58 Fed. 723, 7 C. C. A. 444 (1893).

[77] McGurk v. Metropolitan L. Ins. Co., 56 Conn. 528, 16 Atl. 263 (1888).

[78] Newman v. Covenant, etc., Ins. Ass'n, 76 Iowa 56, 40 N. W. 87 (1888).

[79] Cumberland Valley, etc., Co. v. Schell, 29 Pa. St. 31 (1857).

[80] Phenix Ins. Co. v. Holcombe, 57 Neb. 622, 78 N. W. 300 (1899).

[81] United Firemen's Ins. Co. v. Thomas, 92 Fed. 127, 34 C. C. A. 240 (1899).

in procuring the insurance.[82] The general rule is that the principal is not chargeable with notice of facts learned by the agent in the course of an employment in no way connected with the agency.[83] But there are cases which do not admit this limitation;[84] and others hold the principal bound by knowledge acquired by the agent in another business, acquired at such a time with reference to the issuance of the policy as to justify the assumption that he had it in mind when the policy was issued.[85]

§ 165. **Notice of loss to local agent.**—The local agent of a fire insurance company had actual authority to accept applications for insurance, fix the premium or rate of insurance, and fill up, countersign and issue policies thereon, which he received from the company, already signed by its president and secretary. This was the extent of the agent's actual authority, and there was no evidence tending to show that his apparent authority was other or greater than his actual authority. The policy required written notice of loss to be given to the company. It was held that the agent had no authority to receive or waive notice of loss, and, hence, notice to him was not notice to the company.[86]

§ 166. **Rights and liabilities of agent.**—As between the principal and agent, their rights and liabilities are determined by the express or implied provisions of the contract of employment. The agent is entitled to his compensation for services performed, and the company can not refuse to pay his commissions on the ground that it had

[82] United Firemen's Ins. Co. v. Thomas, 92 Fed. 127 (1899).

[83] St. Paul, etc., Ins. Co. v. Parsons, 47 Minn. 352 (1891).

[84] See Hartford F. Ins. Co. v. Haas, 87 Ky. 531, 2 L. R. A. 64 (1888).

[85] Stennett v. Pennsylvania F. Ins. Co., 68 Iowa 674 (1886). "The knowledge of the fire-works shown here was acquired by the agent, not while acting for the company or for his firm, but casually while attending to his own affairs. To make this knowledge affect the company it must be shown that the agent afterwards, with this information present in his mind, issued the policy or did some act in the course of his duties as agent recognizing the continuing validity of the policy:" Phœnix Ins. Co. v. Flemming, 65 Ark. 54, 39 L. R. A. 789 (1898).

[86] Ermentrout v. Girard, etc., Ins. Co., 63 Minn. 305, 30 L. R. A. 346 (1895), citing Lohnes v. Ins. Co., 121 Mass. 439 (1877); Smith v. Niagara F. Ins. Co., 60 Vt. 682 (1888); Bush v. Westchester F. Ins. Co., 63 N. Y. 531 (1876). See Ruthven v. American F. Ins. Co., 92 Iowa 316, 60 N. W. 663 (1894). See § 188, *infra*.

decided to change its rates and charge a higher rate after the services were performed. An agent procured applications for insurance in accordance with his instructions and the rules and regulations of the company, and forwarded them to the home office of the defendant for its action upon them. The applications were in due form, and the court said that it is to be presumed that the applicants were insurable risks, and that the risks were satisfactory to the company. No objection to them was pointed out, and the presumption is that none existed. The only objection made to delivering the policies was that the rate of premium on them was too low. It was held that while an agent is not usually entitled to his commissions until the transaction is complete, yet, if he has faithfully performed his part of the transaction, and from no fault of his own, but by the refusal of the principal to complete the contract, it is not consummated, he is entitled to his commissions.[87]

The agent is responsible to the company for damages caused by his neglect to cancel a policy within a reasonable time after being instructed to do so,[88] or by accepting a risk and issuing a policy contrary to instructions,[89] or by wrongfully and without authority canceling a policy.[90]

Acceptance of a premium by an insurance company is not a ratification, as between it and its agent, of the latter's unauthorized issuance of a policy, since, the policy being binding on the company, the premium became its property, as an incident to the policy, and did not prevent its seeking recourse over against its agent; and this though the agent had first deducted his commission from the premium.[91]

[87] Currier v. Mutual, etc., Ass'n, 108 Fed. 737 (1901). As to the agent's right to damages for breach of contract, see Pellet v. Manufacturers', etc., Ins. Co., 104 Fed. 502, 43 C. C. A. 669 (1900).

[88] Phœnix Ins. Co. v. Pratt, 36 Minn. 409 (1887); Franklin Ins. Co. v. Sears, 21 Fed. 290 (1884).

[89] Hanover F. Ins. Co. v. Ames, 39 Minn. 150 (1888).

[90] American, etc., Ins. Co. v. Anderson, 130 N. Y. 134 (1891). As to the liability of sureties on agent's bond, see Royal Ins. Co. v. Clark, 61 Minn. 476 (1895).

[91] Mechanics', etc., Ins. Co. v. Rion, (Tenn. Ch.), 62 S. W. 44 (1901).

CHAPTER IX.

THE RULES OF WAIVER AND ESTOPPEL AS APPLIED TO CONTRACTS OF INSURANCE.

§ 175. **In general.**—The doctrines of waiver and estoppel are so commingled in the cases that the underlying distinctions are frequently disregarded. Waiver implies an intent not to assert a known right by one who has full knowledge of the circumstances. It is the result of a mental conclusion arrived at by the party, while an estoppel is a conclusion drawn by the law from something said or done by a party upon which another has relied to his prejudice. Estoppel may thus exist where there is no technical waiver. It is often said that a party has waived certain rights, and, therefore, is estopped from thereafter asserting them.[1]

§ 176. **Definition.**—A waiver is the voluntary relinquishment of a known right. It may be by express language or by acts from which an intention to waive may be inferred or from which a waiver follows as a legal result.[2]

[1] Spoeri v. Massachusetts, etc., Ins. Co., 39 Fed. 752 (1872). There can be no estoppel where the insured has not been misled to his prejudice: Boyd v. Ins. Co., 90 Tenn. 212, 16 S. W. 470 (1891).

[2] German Ins. Co. v. Gibson, 53 Ark. 494, 14 S. W. 672 (1890). The

§ 177. **Knowledge and intent.**—As a waiver is the intentional relinquishment of a right, both intent and knowledge of the facts are essential elements.[3] Hence, to establish a waiver of any of the rights of the insurer it must be shown that there was "knowledge on the part of the insurer of the act or omission on the part of the insured which it claimed to have dispensed with or waived. The knowledge on a waiver need not be expressly shown, but may be implied, when the act of commission or omission is of such a character as fairly to preclude the idea of ignorance."[4]

§ 178. **Basis of waiver.**—It has been held that a waiver, to be operative, must be supported by an agreement founded upon a valuable consideration, or the acts relied upon must be such as to estop a party from insisting upon a performance of the contract, or the forfeiture of the conditions.[5] This rule was at one time declared in New York, but it was subsequently held that such a waiver need not be based upon a new consideration or upon facts sufficient to establish an estoppel,[6] and this is now the prevailing rule.[7] As said in a New York case: "While the later decisions all hold that such waivers need not be based upon a technical estoppel in all the cases where this question is presented, where there has been no express waiver, the fact is recognized that there exist the elements of an estoppel."[8]

waiver of a forfeiture gives the policy the same force and effect as it originally possessed: Siltz v. Hawkeye Ins. Co., 71 Iowa 710, 29 N. W. 605 (1886).

[3] Ryan v. Springfield, etc., Ins. Co., 46 Wis. 671 (1879); Findeisen v. Metropole F. Ins. Co., 57 Vt. 520 (1885); Diehl v. Adams, etc., Ins. Co., 58 Pa. St. 443, 98 Am. Dec. 302 (1868).

[4] 2 Biddle Ins., § 1053.

[5] Merchants', etc., Co. v. Lacroix, 45 Tex. 158 (1876); Weidert v. State Ins. Co., 19 Ore. 261, 24 Pac. 242 (1890). See Equitable L. Assur. Soc. v. McElroy, 83 Fed. 631, 28 C. C. A. 365 (1897).

[6] Roby v. American Cent. Ins. Co., 120 N. Y. 510 (1890); Titus v. Glens Falls Ins. Co., 81 N. Y. 410 (1880).

[7] Carpenter v. Continental Ins. Co., 61 Mich. 635 (1886); Hollis v. State Ins. Co., 65 Iowa 254 (1884); Schimp v. Cedar Rapids Ins. Co., 124 Ill. 354 (1888); Grubbs v. North Carolina, etc., Ins. Co., 108 N. C. 472 (1891).

[8] Armstrong v. Agricultural Ins. Co., 130 N. Y. 560 (1892); German Ins. Co. v. Gibson, 53 Ark. 494 (1890). "Nor in general, where the facts do not constitute an estoppel, should one who neither knows the fact of the forfeiture, nor is chargeable with fault in not knowing it, be held to have waived the same by acts or conduct not intended to have such effect:" St. Paul, etc., Ins. Co. v. Parsons, 47 Minn. 352 (1891).

§ 179. **Effect of mere silence.**—A waiver can not be inferred from mere silence. Where no word or act has been said or done to mislead the insured or throw him off his guard, mere silence will not sustain a waiver.[9]

§ 180. **What may be waived.**—The provisions of an insurance contract are, almost without exception, intended for the benefit of the insured, and upon their breach it is optional with the insurer to claim a forfeit. Such conditions may, hence, be waived.[10] As above stated, mere silence will not amount to a waiver, but in some states it is held that the company can not "sleep upon its intention" to avoid a policy to the prejudice of the insured.[11]

Where the laws of the state or the charter of a corporation provides that an act shall be done, and prescribes the manner in which it shall be done, and declares the act void if done otherwise, the insurer can not waive the performance of the act in the prescribed manner.[12] Statutory provisions affecting the form of the contract can not be waived by the parties.[13]

[9] Titus v. Glens Falls Ins. Co., 81 N. Y. 410 (1880); More v. New York, etc., Ins. Co., 130 N. Y. 537 (1892); Mueller v. South Side F. Ins. Co., 87 Pa. St. 399 (1878); McAllaster v. Niagara F. Ins. Co., 156 N. Y. 80, 50 N. E. 502 (1898).

[10] Coursin v. Pennsylvania Ins. Co., 46 Pa. St. 323 (1863); Ellis v. Massachusetts, etc., Ins. Co., 113 Cal. 612, 54 Am. St. 373 (1895). The furnishing of proofs of death within a definite time is waived by a letter from the company asking that the claim be allowed to rest until the adjuster of the company can see the claimant: Turner v. Fidelity, etc., Co., 112 Mich. 425, 38 L. R. A. 529 (1897). The company waives the provision requiring the certificate of the nearest notary public where it retains the one furnished for twenty-three days, and then objects to it on the ground that there is a nearer notary, but does not give his name or address: Paltrovitch v. Phœnix Ins. Co., 143 N. Y. 73, 25 L. R. A. 198 (1894).

[11] Appleton Iron Co. v. British Amer. Assur. Co., 46 Wis. 23 (1879).

[12] Cravens v. New York L. Ins. Co., 148 Mo. 583, 71 Am. St. 628 (1898); Leonard v. American Ins. Co., 97 Ind. 299 (1884).

[13] Anderson v. Manchester F. Assur. Co., 59 Minn. 182 (1894); N. H. Pub. St. 1891, § 18. An insurance company waives the right to rebuild, although the thirty days provided in the policy within which to exercise the option has not expired, where it has expressly refused to rebuild and given notice that it would pay the amount of the loss which might be fixed by arbitrators: Platt v. Ætna Ins. Co., 153 Ill. 113, 26 L. R. A. 853 (1894).

§ 181. **Waiver of certain defenses.**—The insurer may refuse to pay a loss without specifying the ground of its refusal and thereafter insist upon any defense it may have under the contract.[14] It should not be deprived of a defense merely because it failed to disclose it to the other party. It is under no obligation to do this, but where it states that the policy will not be paid for a specified reason it is estopped to assert other reasons when the previous statement showed an intention to abandon other defenses or resulted in injury to the insured. Thus, where the company, with knowledge of the forfeiture, remains silent and puts the insured to the inconvenience and expense of preparing proofs of loss which, under the defense of forfeiture, was wholly unnecessary, it was held to have waived the forfeiture.[15]

"It is well settled that such defenses are waived when the company, with knowledge of all the facts, requires the assured, by virtue of the contract, to do some act or incur some expense or trouble inconsistent with the claim that the contract had become inoperative in consequence of the breach of some of the conditions."[16]

[14] Devens v. Mechanics', etc., Ins. Co., 83 N. Y. 168 (1880).

[15] Thompson v. Phenix Ins. Co., 136 U. S. 287 (1890); Fireman's Fund Ins. Co. v. Norwood, 69 Fed. 71, 16 C. C. A. 136 (1895); Marthinson v. North British, etc., Ins. Co., 64 Mich. 372 (1887); Phœnix Ins. Co. v. Flemming, 65 Ark. 54, 39 L. R. A. 789 (1898). A general statement in a letter calling for the proofs of the loss, that the company did not waive any manner of defense, was held insufficient: Marthinson v. North British, etc., Ins. Co., 64 Mich. 372 (1887). It has been held that the company waives a cause of forfeiture of the policy by failure to mention it when it undertakes to state definitely its reasons for denying liability. "Good faith requires that the company shall apprise the plaintiff of its position, and, failing to do this, it estops itself from asserting any defense other than that brought to the notice of the plaintiff:" Smith v. German Ins. Co., 107 Mich. 270, 30 L. R. A. 368 (1895); Towle v. Ionia, etc., Ins. Co., 91 Mich. 225, 51 N. W. 987 (1892), and cases there cited.

[16] Trippe v. Provident Fund Soc., 140 N. Y. 23, 22 L. R. A. 432 (1893); McNally v. Phœnix Ins. Co., 137 N. Y. 389 (1893); Granger v. Manchester F. Assur Co., 119 Mich. 177, 77 N. W. 693 (1899). In Corson v. Anchor, etc., Ins. Co. (Iowa), 85 N. W. 806 (1901), McClain, J., said: "Appellant contends, however, that by signing what is called a 'non-waiver agreement' the insured cut himself off from relying on these acts of the adjuster as constituting a waiver of the forfeiture. It appears that the adjuster, after having acquired knowledge of how the books had been kept, insisted that before he would proceed with the adjustment of the loss the insured should sign

§ 182. **Power of agent to waive.**—If the authority of the agent is general, so that his acts are the acts of the company, he can waive a provision of the policy if it is of such a character that it could have been waived by the company.[17] He can, of course, waive only provisions which are in respect to matter within the scope of his agency.[18]

§ 183. **Waiver by agent—Continued.**—The insured may rely upon the representations of an agent who issues the policy and upon his assumed authority to waive provisions in the policy when there are no restrictions upon the agent's authority which are brought to his knowledge.[19] Where the policy provided that additional insurance, without the written assent of the company indorsed thereon, would render the policy void, and that its agents had no power to waive such condition, the court said:[20] "It can not be successfully maintained but that the company has the right and the power to restrict as it may choose the powers and duties of its agents, and when the authority is expressly limited and restricted by the policy which the

this agreement, by which it was stipulated that 'nothing said adjuster may do or say or write shall in any way be construed as waiving any of the rights or defenses of said company, or any conditions or requirements of said policy as to proofs of loss or otherwise.' With reference to the forfeiture in question, it seems to us that this agreement was wholly immaterial. The adjuster must be presumed to have had the power to waive a forfeiture. Brown v. State Ins. Co., 74 Iowa 428, 38 N. W. 135; Ruthven v. American F. Ins. Co., 102 Iowa 550, 560, 71 N. W. 574; Brock v. Des Moines Ins. Co., 106 Iowa 30, 75 N. W. 683. He did proceed to adjust the loss, and required the insured to furnish proofs, including the procurement of the duplicate invoices, notwithstanding his knowledge of the facts amounting to a forfeiture. The nonwaiver clause was in itself a part upheld and enforced. It clearly relates to future transactions, and the agent had no power to waive the condition when he took the application." But a failure to give notice of loss as required by the policy is not waived by retaining the proofs of loss sent after the policy was dead and all liability on it had ceased, where the insurer gave notice of the denial of any liability on the policy: Ermentrout v. Girard, etc., Ins. Co., 63 Minn. 305, 30 L. R. A. 346 (1896).

[17] Kruger v. Western, etc., Ins. Co., 72 Cal. 91 (1887); Alexander v. Continental Ins. Co., 67 Wis. 422 (1886).

[18] Imperial F. Ins. Co. v. Dunham, 117 Pa. St. 460, 12 Atl. 668 (1888).

[19] Kitchen v. Hartford F. Ins. Co., 57 Mich. 135 (1885).

[20] Cleaver v. Traders' Ins. Co., 65 Mich. 527 (1887). To the same effect is New York L. Ins. Co. v. Fletcher, 117 U. S. 519 (1886), and Maier v. Fidelity, etc., Ass'n, 47 U. S. App. 322 (1897).

insured receives there can be no good reason either in law or equity why such limitations and restrictions shall not be considered as known to the insured and binding upon him. * * * The fact that the plaintiff may not have read the printed conditions of his policy and relied in ignorance of them upon the implied or assumed powers of the agent can not help him. It was his business to know what his contract of insurance was, and there can be no difference in this respect between an insurance policy and any other contract. In the absence of any fraud in making the same, and none is claimed in this case, the insured must be held to a knowledge of the terms of this policy as he would be in case of any other contract or agreement. When the policy of insurance, as in this case, contains an express limitation upon the power of the agent, such agent has no legal right to contract as agent of the company with the insured so as to change the conditions of the policy or to dispense with the performance of any essential requisite contained therein either by parol or writing; and the holder of the policy is estopped by accepting the policy from setting up or relying upon powers in the agent in opposition to conditions and restrictions in the policy."[21] Where a policy provides that no conditions thereof shall be waived or altered unless consent thereto is indorsed on the policy, and the company's agent consented to a removal of the insured stock to other premises, and continued to accept premiums, the insurer can not successfully defend an action on the policy on the ground that the consent was not binding because not indorsed on the policy.[22]

§ 184. **Prepayment of premium.**—An agent authorized to make contracts of fire insurance and issue policies has authority to waive payment in cash of premiums, and to give credit therefor, unless there are restrictions upon his authority of which the insured has notice. If the agent collects the premium and fails to pay it over to the insurance company, the rights of the assured are not affected thereby. "By the weight of authority the agent is held to have this discretionary power, although the policy in terms denies it. The waiver of the payment of the premium in cash is an act within the exercise of the

[21] See also Merserau v. Phœnix, etc., Ins. Co., 66 N. Y. 274 (1876); Catoir v. American L. Ins., etc., Co., 33 N. J. L. 487 (1886); First Nat. Bank v. Lancashire Ins. Co., 62 Tex. 461 (1884).

[22] Pollock v. German F. Ins. Co. (Mich.), 86 N. W. 1016 (1901).

general authority to issue policies and collect the premiums, and such waiver may be either express or implied."[23]

§ 185. **Waiver in writing only.**—Insurance policies ordinarily provide that their terms and conditions can only be waived or changed by an indorsement in writing upon the policy. These provisions are construed to apply only to conditions which enter into and form part of the contract, and which are essential to make it binding, and not those which refer to what is to be done after a loss.[24] Such provisions are given full force and effect by some courts;[25] while others limit their binding force to sub- or special agents, and hold that general officers and agents of the company, when acting within the scope of their authority, may waive this provision by an oral stipulation.[26] So, the company may, by its conduct, be estopped to assert that a waiver in a manner other than that provided in the policy is binding.[27] Where an agent had general authority the court said:[28] "He had power to bind the company by consenting that the policy remain in force notwithstanding the transfer of title and the sale on mortgage foreclosure; and, notwithstanding the condition of the contract, that such consent should be indorsed on the policy, it might be given otherwise. The company could not by such a provision in its policy divest itself of the power to afterward enter into another agreement and stipulations through its proper agent concerning the risk."

§ 186. **Limitations in policy—Prepayment of premium.**—An agent whose duties were to solicit insurance, fill up blanks and printed

[23] Newark Mach. Co. v. Kenton Ins. Co., 50 Ohio St. 549, 22 L. R. A. 768 (1893); Bodine v. Exchange F. Ins. Co., 51 N. Y. 117, 10 Am. Rep. 566 (1872); Stewart v. Union, etc., Ins. Co., 155 N. Y. 257, 42 L. R. A. 147 (1898).

[24] Carson v. Jersey City Ins. Co., 43 N. J. L. 300 (1881).

[25] Northern Assur. Co. v. Grand View Bldg. Ass'n (U. S.), 22 Sup. Ct. 133 (1902); Gould v. Dwelling-House Ins. Co., 90 Mich. 302, 51 N. W. 455 (1892); Gladding v. California, etc., Ins. Ass'n, 66 Cal. 6 (1884); Enos v. Sun Ins. Co., 67 Cal. 621 (1885); Morrison v. North Amer. Ins. Co., 69 Tex. 353, 5 Am. St. 63 (1887); Barnard v. National F. Ins. Co., 38 Mo. App. 106 (1889).

[26] Renier v. Dwelling-House Ins. Co., 74 Wis. 89, 42 N. W. 208 (1889).

[27] See, generally, Gans v. St. Paul, etc., Ins. Co., 43 Wis. 108 (1877); McFarland v. Kittanning Ins. Co., 134 Pa. St. 590, 19 Atl. 796 (1890); Gould v. Dwelling-House Ins. Co., 90 Mich. 302 (1892).

[28] St. Paul, etc., Ins. Co. v. Parsons, 47 Minn. 352 (1891); Anderson v. Manchester F. Assur. Co., 59 Minn. 182 (1894).

policies already signed by the general officers of the company and left in his possession, countersigned and delivered a policy to the assured and gave him temporary credit for the premium. Before it was paid the property was destroyed, and the question was whether the company was bound by the act of the agent in waiving immediate payment of the premium and giving credit. The policy contained a provision that "no insurance shall be considered as binding until actual payment of the premium." The court said:[29] "It would seem well settled by the great weight of authority that, at least in the case of stock companies, a person dealing with an agent possessing the powers exercised by this agent has a right to assume, in the absence of notice to the contrary, that he has authority pending negotiations for a contract of insurance to waive a provision like the one quoted, and to give a short credit for the premium. But it is the undoubted right of the company, as in the case of any principal, to impose a limitation upon the authority of its agent. And it is as elementary as it is reasonable that if an agent exceeds his actual authority, and the person dealing with him has notice of that fact, the principal is not bound. The policy also contained a provision that 'this policy is made and accepted upon the above express terms, and no part of this contract can be waived except in writing, signed by the secretary of the company.' The words 'policy' and 'contract' are evidently here used as synonymous, and the latter clause clearly means that none of the terms of the policy can be waived by any one except the secretary. Conceding that this would not prevent the company itself, through its board of directors or other body representing it in its corporate capacity, from waiving any of the terms or conditions of the policy, yet it is a plain declaration that no representative of the company but the secretary can do so, and hence that no local agent can do it. This, being in the policy itself, was notice to plaintiff that this agent had no authority to waive the condition that no insurance would be binding till payment of the premium. It is no answer to say that he did not read the policy, and hence did not know what it contained."

[29] Wilkins v. State Ins. Co., 43 Minn. 177, 45 N. W. 1 (1890). That an agent with power to solicit insurance and issue a policy has implied power to waive prepayment of the first premium, see Lebanon Mut. Ins. Co. v. Hoover, 113 Pa. St. 591, 15 Am. Rep. 511 (1886); Michigan Pipe Co. v. Michigan, etc., Ins. Co., 92 Mich. 482, 20 L. R. A. 277 (1893). But see Tomsecek v. Travelers' Ins. Co. (Wis.), 88 N. W. 1013 (1902).

§ 187. Estoppel by act of agent.—In order to prevent fraud and injustice, the doctrine of estoppel is applied where the insured has been misled to his prejudice by the agent of the insurance company. The cases in which this rule has been applied may be classified as follows:

1. Where there were misrepresentations by the agent with reference to some facts material to the risks, or made so by the terms of the contract contained in an application prepared by the agent in the name of the insured, but without his authority, and upon which the company acted in issuing the policy.[30]

2. Where the agent, having been authorized by the insured to fill out the application in his name, misstates by a mistake or inadvertence the information given by the insured and thereby misleads the company.[31]

3. Where the policy declares that certain facts or conditions will invalidate the policy unless disclosed to the insurer and indorsed on

[30] Benninghoff v. Agricultural Ins. Co., 93 N. Y. 495 (1883); Sprague v. Holland, etc., Ins. Co., 69 N. Y. 128 (1877); Vilas v. New York, etc., Ins. Co., 72 N. Y. 590 (1878); Ames v. New York, etc., Ins. Co., 14 N. Y. 253 (1856); Combs v. Hannibal, etc., Ins. Co., 43 Mo. 148, 97 Am. Dec. 383 (1869); Kister v. Lebanon Mut. Ins. Co., 128 Pa. St. 553, 5 L. R. A. 646 (1889).

[31] Rowley v. Empire Ins. Co., 36 N. Y. 550 (1867); Baker v. Home L. Ins. Co., 64 N. Y. 648 (1876); Grattan v. Metropolitan L. Ins. Co., 92 N. Y. 274 (1883); Bennett v. Agricultural Ins. Co., 106 N. Y. 243 (1887); Home F. Ins. Co. v. Fallon, 45 Neb. 554, 63 N. W. 860 (1895); Home Ins. Co. v. Hancock (Tenn.), 52 L. R. A. 665 (1901), and cases cited in note; Stone v. Hawkeye Ins. Co., 68 Iowa 737, 56 Am. Rep. 870 (1886); Creed v. Sun Fire Office, 101 Ala. 522, 23 L. R. A. 177, Woodruff Ins. Cas. 38 (1893). In some cases this rule is carried almost far enough to permit estoppel where the agent is in collusion with the applicant: See Whitney v. National, etc., Ass'n, 57 Minn. 472, 59 N. W. 943 (1894); Schwarzbach v. Ohio Valley, etc., Union, 25 W. Va. 622, 52 Am. Rep. 227 (1885); Germania L. Ins. Co. v. Lunkenheimer, 127 Ind. 536 (1890). The rule that a breach of warranty of the truth of the applicant's answers avoids the insurance policy without reference to his good faith or the materiality of the answer does not apply where the falsity of the answer resulted from a mistake in judgment or a blunder of the company's agent, who was charged by the company with the preparation of the application, and who made the answers upon a full and truthful statement of the facts by the applicant: Mutual, etc., Ins. Co. v. Robison, 58 Fed. 723, 22 L. R. A. 325, 7 C. C. A. 444 (1893). See statement of rule by Judge Cooley in Ætna, etc., Ins. Co. v. Olmstead, 21 Mich. 251, 4 Am. Rep. 483 (1870).

the policy, and the company issues the policy although it has knowledge through its agent of the facts relied upon to defeat the policy.[32]

All of these cases relate to transactions prior to the completion of the contract.

In the New York case[33] in which the above classification was made it was held that "the principle which relieves the party insured from responsibility for unauthorized representations made by the agent of the insurer in respect of some incident of the risk, and permits them to be disregarded in an action to enforce the contract, has no application where the point in issue is as to the subject of the insurance, and the contract is explicit upon that point. If the contract of insurance relates to one definite and distinct subject it can not be turned into a contract for the insurance of another and different subject on proof that the agent of the company, by mistake, described the wrong property in his application."

§ 188. **Facts known to company when policy issued.**—By the weight of authority, although the supreme court of the United States, under a contract which required a waiver to be indorsed on the policy, recently held to the contrary,[34] an insurance company will not be permitted to take advantage of a condition contained in the policy to avoid payment of a loss when the facts rendering the policy void by its terms were known to the insurer at the time it issued the policy and accepted the premium. Such a policy, if void, is void from the moment of its delivery. This doctrine rests upon the ground that facts made known to the agent of the company, who is empowered by it to solicit insurance, countersign and issue policies and collect premiums, are known to the principal, and that a fraud would be perpetrated if an insurer, through the medium of its agents, were allowed to deliver its policy and accept the premium with knowledge of facts which under its provisions rendered it void *ab initio,* and thereafter assert its invalidity.[35] Thus, where the insured warranted that "a

[32] Van Schoick v. Niagara F. Ins. Co., 68 N. Y. 434 (1877); Richmond v. Niagara F. Ins. Co., 79 N. Y. 230 (1879); Short v. Home Ins. Co., 90 N. Y. 16 (1882). Where the omission to mention incumbrance and other insurance in an application was by the advice of the solicitor who issued the policy in the name of the agent, and who had full knowledge of the facts, the company was estopped to assert a forfeiture: Goode v. Georgia, etc., Ins. Co., 92 Va. 392, 30 L. R. A. 842 (1895).

[33] Sanders v. Cooper, 115 N. Y. 279 (1889).

[34] Northern Assur. Co. v. Grand View Bldg. Ass'n, 22 Sup. Ct. 133 (1902).

[35] Fireman's Fund Ins. Co. v. Norwood, 16 C. C. A. 136 (1895); Northern Assur. Co. v. Grand

continuous clear space of one hundred and fifty feet shall hereafter be maintained" between the property insured and a certain building,

View B. Ass'n, 101 Fed. 77, 41 C. C. A. 207 (1900) [but this case was reversed in 22 Sup. Ct. 133 (1902)]. These cases present a very full review of the authorities on both sides of the question, as Judge Sanborn filed dissenting opinions in each case. See also Home Ins. Co. v. Mendenhall, 164 Ill. 458, 36 L. R. A. 374 (1897); Mesterman v. Home Mut. Ins. Co., 5 Wash. 524, 34 Am. St. 877 (1893); Independent School Dist. v. Fidelity Ins. Co. (Iowa), 84 N. W. 956 (1901). Where the agent of the company knew at the time that the policy was issued that fire-works were intended to be kept on the premises, the issuance of the policy under such circumstances is a waiver of a condition therein forbidding the keeping of fire-works. "It is now too well settled to require discussion that the issuance of a policy of insurance with a knowledge of facts, which by the terms of the policy render it void, will be treated as a waiver of such ground of forfeiture. This is true even though the policy contains a stipulation that the conditions of the policy shall not be waived by any officer or agent of the company unless such waiver be indorsed upon the policy. It is a general rule of law that the parties to a written contract may afterward change or alter such contract by a parol agreement to that effect, and contracts with insurance companies furnish no exception to this rule:" Phœnix Ins. Co. v. Flemming, 65 Ark. 54, 39 L. R. A. 789 (1898); Dwelling-House Ins. Co. v. Brodie, 52 Ark. 11, 4 L. R. A. 458 (1889). "It has uniformly been held by this court that a condition of this character in a contract of insurance will not operate to avoid it after a loss, providing the company before the delivery of the policy had knowledge of the fact that the insured, notwithstanding the warranty or a statement to that effect, was not the owner, or that it was incumbered. In such cases the company is deemed to have waived the condition by the delivery of the policy, with a condition avoiding it in case the insured is not the sole owner, or that the property is incumbered, and accepting the premium, and is held to be estopped from setting up the condition as a defense. It was never supposed that such a condition was intended to apply to a state of facts in regard to which the company had been fully informed when it accepted the risk:" Forward v. Continental Ins. Co., 142 N. Y. 382, 25 L. R. A. 635 (1895). The knowledge of the agent that the insured had made a contract for the sale of the property covered by the policy estops the company from denying that he had the sole and unconditional ownership required by the policy: Hamilton v. Dwelling-House Ins. Co., 98 Mich. 535, 22 L. R. A. 527 (1894). The knowledge of the secretary of the company when issuing the policy that there is other insurance, which the insured agrees to let expire, prevents the forfeiture of the policy for a false statement in the application that there is no other insurance: Dailey v. Preferred, etc., Ass'n, 102 Mich. 289, 26 L. R. A. 171. See also Reed v. Equitable, etc., Ins. Co., 17 R. I. 785, 18 L. R. A. 496 (1892). As to the effect of knowledge by the company's agent of the falsity of statements in the application, see Clemans v. Supreme Assem-

and the agent of the insurer knew that the existing facts were otherwise, and that it was not within the power of the insured to change them, the policy was held valid. The court said:[36] "The defendant insists that the clause must be rendered literally and without reference to the knowledge of the agent as to what the actual distance was, thereby asserting that it has the right to accept the money of the insured, issue its policy therefor and lead it to understand that it has a valid insurance until a loss occurs, and then to repudiate its liability. Such a rule as this would enable it to affirm a contract entered into by it with full knowledge of all the facts, in so far as said contract might be of advantage to it, and to repudiate it the moment it ceased to be advantageous. This is inequitable and contrary to the well-established rule in reference to when and how the repudiation of a contract shall be made. The knowledge of the agent is the knowledge of the company. If the insurer receives the premium with full knowledge of facts constituting a breach of one of the conditions of the policy, the right to insist that the policy is forfeited for that cause is gone." In Kentucky it was recently held[37] that the rule which charges the insurer with the knowledge of its agent of errors or misstatements in the application is not affected by a condition in the policy that the insured shall be responsible for the acts of the agent who makes out the application. A renewal policy of fire insurance was issued to an ignorant and illiterate person without a written application, by an agent who had full power to write insurance and deliver the policy without reference to the home office. It was held that the insurer was bound by the knowledge of the condition of the title of the insured, although he may have acquired such knowledge in business having no connection with the insurance.[38] With reference to the conditions in the policy aforesaid, "the subagent, or the agent of the principal agent, appeared and solicited a renewal of the policy; and it was then signed and filled up at the agent's office and delivered to the appellee. We are not disposed to adjudge that such contracts, shingled over with stipulations that are practically deceptive, if not inserted for that purpose, are binding on the ignorant and illiterate when guilty of no fraud or misrepre-

bly, 131 N. Y. 485, 16 L. R. A. 33 (1892), annotated. To the same effect, see Dowling v. Lancashire Ins. Co., 92 Wis. 63, 31 L. R. A. 112 (1900).

[36] Michigan, etc., Co. v. State, etc., Ins. Co., 94 Mich. 389, 53 N. W. 945 (1892).

[37] Hartford F. Ins. Co. v. Haas, 87 Ky. 531, 2 L. R. A. 64 (1888).

[38] But see § 164, *supra*.

sentation, but had trusted alone to the superior knowledge of the agent, who undertakes to make such an application or to issue such a policy as will meet the requirements of the company he represents. The statements embodied in a policy issued under such circumstances, if false or erroneous, should be regarded as the act of the insurer." This rule has been adopted by the statutes of some of the states.

A provision in the policy that the knowledge of the agent of matters not stated in the application shall not bind the company does not prevent the insured from showing that he made true answers, but that they were wrongfully recorded by the agent of the company.[40] Nor will a similar provision prevent the insured from having the contract rescinded where he was induced to enter into it by the fraudulent representations of the agent of the company.[41]

But the doctrine of estoppel which, as a general rule, is applicable when the policy is issued with knowledge of the facts does not apply when the policy, as a contract, is contrary to law.[42] It is said that the knowledge of the agent of facts which will defeat the policy estops the company only when there is no application signed by the assured.[43] The court said: "The cases in which knowledge of the agent through whom insurance is taken may operate to defeat the right of the com-

[40] Parno v. Iowa, etc., Ins. Co. (Iowa), 86 N. W. 210 (1901). The court said: "It is sought to distinguish these cases on the ground that in the policy in suit the answers of the applicant were made warranties. But that was also the fact in a number of the cases in which the rule stated has been indorsed by this court. In Stone v. Hawkeye Ins. Co., 68 Iowa 737, 28 N. W. 47, in which the facts were similar to those before us, it is said: 'It makes no difference, we think, that plaintiff agreed that the representations in the application should be regarded as warranties by him. He consented to that agreement in the belief that the agent had written down in the application the very statement he had made. As the agent was empowered by the company to take the statement, and acted under that authority when he wrote it, plaintiff was not charged with the duty of seeing to it that it was correctly taken. He had the right to assume that this was done. It would be manifestly unjust to hold that he was bound absolutely by a statement which was wrongfully interpolated into the application by defendant, and which he did not know was there when he consented to the agreement.'" But see U. S. Life Ins. Co. v. Smith, 92 Fed. 503 (1899).

[41] McCarty v. New York L. Ins. Co., 74 Minn. 530, 77 N. W. 426 (1898).

[42] Spare v. Home Mut. Ins. Co., 17 Fed. 568 (1883).

[43] Kenyon v. Knights, etc., Ass'n, 122 N. Y. 247 (1890). See note to Hoose v. Prescott Ins. Co. (Mich.), 11 L. R. A. 340 (1890).

pany to avail itself of the fact so known at the time it is taken are those in which there is no application signed by the assured stating to the contrary of such existing facts, but rests upon a condition expressed in the policy merely. Then it may be presumed that the statement of it in the policy as required by the condition was omitted by mistake or waived." But there are cases which go much farther than this and apply the rule where the statements are inserted in an application and warranted.

But the company is not estopped by the knowledge of the agent that the insured intends to violate one of the conditions of the policy. Thus, knowledge on the part of a fire insurance company's soliciting agent at the time of the issuance of the policy that the insured does not intend to comply with the condition requiring him to keep a set of books, and to take and preserve an inventory, to be produced in case of loss, does not estop the company from setting up the insured's noncompliance with the condition as a defense to a claim for loss. The effect of future conduct is determined by the terms of the contract.[44]

§ 189. **Oral testimony to show actual statements.**—Where the agent writes erroneous statements in the application, the prevailing rule is that oral testimony may be received to show the fact. It was said in the supreme court of the United States: "The testimony was admitted, not to contradict the written warranty, but to show that it was not the warranty of D, though signed by him, prepared as it was by the company's agent, and the answers having been made by the agent, the proposal, both questions and answers, must be regarded as the act of the company, which it can not be permitted to set up as a warranty by the assured."[45] So, in Pennsylvania it was said, with

[44] Sowers v. Mutual F. Ins. Co. (Iowa), 85 N. W. 763 (1901); Gray v. Germania F. Ins. Co., 155 N. Y. 180, 49 N. E. 675 (1898).

[45] Insurance Co. v. Mahone, 21 Wall. (U. S.) 152 (1874); Insurance Co. v. Wilkinson, 13 Wall. (U. S.) 222 (1871); Fireman's Fund Ins. Co. v. Norwood, 69 Fed. 71, 16 C. C. A. 136 (1895), where the authorities are cited and reviewed by Judge Caldwell. In Parno v. Iowa, etc., Ins. Co. (Iowa), 86 N. W. 210 (1901), it was said: "Appellant's next contention is that the matter of estoppel is not susceptible of proof, because it would necessitate the contradiction of the terms of a writing by parol evidence. It is the rule in this state that where the assured has returned truthful answers to the agent of the company, who has recorded them incorrectly in the application, the facts may be shown by oral evidence, to estop the company from

reference to certain cases: "In each there was no question but that the warranty was made, and it was conceded that if there were a mutual mistake between the contracting parties, parol evidence is admissible to reform the policy. None declares that the fraud or mistake of a knavish or blundering agent, done within the scope of the powers given him by the company, will enable the latter to avoid a policy to the injury of the assured, who innocently became a party to the contract. The authorities go far,—very likely not too far,—in holding the assured responsible for his warranty, and in excluding oral evidence to contradict or vary it; but they do not establish that where an agent of the assurer has cheated the assured into signing the warranty and paying the premium, and the policy was issued upon the false statements of the agent himself, the assured shall not prove the fact and hold the principal to the contract as if he had committed the wrong."[46]

Massachusetts, New Jersey and Rhode Island refuse to recognize this rule, and hold that a waiver of the forfeiture existing at the inception of the contract can not be shown by oral testimony of what occurred at or before the closing of the contract.[47] Even in these states, a waiver occurring after the inception of the contract may be shown by parol.[48]

setting up the statements in the application as a defense. Warshawky v. Anchor, etc., Ins. Co., 98 Iowa 221, 67 N. W. 237; Carey v. Home Ins. Co., 97 Iowa 619, 66 N. W. 920; McComb v. Council Bluffs Ins. Co., 83 Iowa 247, 48 N. W. 1038; Jamison v. State Ins. Co., 85 Iowa 229, 52 N. W. 185; Reynolds v. Iowa, etc., Ins. Co., 80 Iowa 563, 46 N. W. 659; Key v. Des Moines Ins. Co., 77 Iowa 174, 41 N. W. 614. In Donnelly v. Cedar Rapids Ins. Co., 70 Iowa 692, 28 N. W. 607, the court says that the parol evidence in such a case is not introduced for the purpose of contradicting the written contract, but only to estop the company from setting up as a defense the falsity of the statements in the application."

[46] Trunkey, J., in Eilenberger v. Protective, etc., Ins. Co., 89 Pa. St. 464 (1879), quoted in Kister v. Lebanon Mut. Ins. Co., 128 Pa. St. 553, 5 L. R. A. 646 (1889).

[47] Batchelder v. Queen Ins. Co., 135 Mass. 449 (1883); Dewees v. Manhattan Ins. Co., 35 N. J. L. 366 (1872); Reed v. Equitable, etc., Ins. Co., 17 R. I. 785, 24 Atl. 833 (1892). In the last case it was said: "We recognize the tendency of the decisions in favor of the assured, and if this were a new question in this state, we might feel compelled to yield to the weight of authority. Opposed to this line of decisions Massachusetts has stood almost alone, with a sturdiness characteristic of that old commonwealth."

[48] Oakes v. Manufacturers' Ins. Co., 135 Mass. 248 (1883); Metropolitan

§ 190. **Bad faith—Collusion between applicant and agent.**—Where there is collusion between the applicant and the agent of the company, knowledge of the fraud attempted by the applicant can not be imputed to the company, and made the basis of an estoppel.[49] The principal is bound by the acts of his agent while he acts within the scope of his reputed authority, but if he commits a fraud upon his principal, an applicant who is *particeps criminis* will not be allowed to profit by the fraud.[50]

L. Ins. Co. v. McTague, 49 N. J. L. 587 (1887).

[49] Centennial, etc., Ass'n v. Parham, 80 Tex. 518, 16 S. W. 316 (1891). Where an untrue answer is written with the consent of the applicant, there can be no recovery: Blooming Grove, etc., Ins. Co. v. McAnerney, 102 Pa. St. 335, 48 Am. Rep. 209 (1883).

[50] Hanf v. Northwestern, etc., Ass'n, 76 Wis. 450, 45 N. W. 315 (1890); Eilenberger v. Protective, etc., Ins. Co., 89 Pa. St. 464 (1879).

Part VI.

THE STANDARD POLICY AND ITS PROVISIONS.

CHAPTER X.

PROVISIONS OF THE STANDARD POLICY.

§ 200. In general.—A common form of marine policy has been in use since the adoption of Lloyds' policy in 1779. This instrument was characterized by Mr. Justice Buller as "absurd and incoherent," but the meaning of its language has become fixed by custom and judicial decision. The movement toward a standard form of policy for fire insurance began as early as 1821, when a form was adopted by a committee of New York underwriters which gradually came into use by the different companies.

In 1867 the legislature of Connecticut passed a law which required the use of a common form in that state, but it met with so much opposition on the part of the insurance companies that the statute was repealed the following year.[1] Standard forms are now required by the statutes of fourteen states, and it is very probable that similar laws will soon be enacted in the other states of the Union.

§ 201. The Massachusetts standard policy.—In 1873 the legislature of Massachusetts provided for a form which, after various modifications, became the present standard policy, which went into effect in 1887. The principal difference between this policy and what has since become known as the New York standard policy is the provision which permits the parties to modify its language by riders attached to the policy.

The New Hampshire form was adopted in 1885, and is modeled after that of Massachusetts, with such changes as were rendered necessary by the New Hampshire statutes, portions of which are required to be printed upon the back of the policy and form part of the contract.

Maine also followed Massachusetts, and in 1895 provided for a standard form which should be as nearly as practicable the same as that of Massachusetts.

The Minnesota act of 1889[2] imposed upon the insurance commissioner the duty of preparing a form which should become obligatory after that year. The New York form was prepared and went into use, but the statute was held unconstitutional because it was attempted to delegate legislative powers to the insurance commis-

[1] Conn. Laws 1867, ch. 121.

[2] Minn. Gen. Stat. 1894, § 3200 (Gen. Laws 1889, ch. 217).

sioner.[3] In 1895[4] the legislature adopted the Massachusetts instead of the New York form, with such modifications as were necessary to prevent conflict with the valued-policy law then in force. Riders were permitted to explain or modify the policy. The insurance companies adopted a general rider which embraced substantially the provisions of the New York standard policy, but the legislature of 1897 prohibited the use of the co-insurance rider, and the making of changes of any kind except as specifically authorized by the act.

§ 202. The New York standard.—What is known as the New York standard form of policy went into effect on the first day of May, 1887.[5] It does not permit riders which change any of its conditions, like the Massachusetts and New Hampshire forms. All variations from the prescribed form are provided for by "clauses" which may be attached to the policy, and which are known as the Application and Survey Clause, Assessment, Installment or Credit Clause, Co-insurance Clause, Conditions as to Incumbrances, Lightning Clause, Mortgage Clauses, Percentage, Limitation and Value Clauses.

Most of the states have followed this form. It was adopted by Michigan in 1889, by North Dakota in 1890, New Jersey in 1892, North Carolina in 1893, South Dakota in 1893, Connecticut in 1894, Rhode Island in 1895, Iowa in 1897,[6] and Louisiana in 1898.

In 1891 Wisconsin passed a law which directed the insurance commissioner to prepare a form which should conform to the New York standard policy, and provided that five days' notice of cancellation by the company should be given, and provided also that proof of loss should be made within sixty days after the fire. This policy went into effect in 1891. In 1895, the question having arisen as to the constitutionality of the legislation, the standard policy was enacted in the form of a statute. Some important changes were made at

[3] Anderson v. Manchester F. Assur. Co., 59 Minn. 182, 60 N. W. 1095, 63 N. W. 241 (1894). The Pennsylvania act of 1891 has been held unconstitutional by the supreme court of the state in O'Neil v. American F. Ins. Co., 166 Pa. St. 72 (1894). An attempt to cure the defect was defeated in 1895. The New York form is in common use. The Wisconsin statute of 1891 was subject to the same objections, but it was cured in 1895.

[4] Minn. Laws 1895, ch. 175.

[5] Provided for by N. Y. Laws 1886, ch. 488.

[6] Iowa has not prescribed a complete form of policy; but a common form is in use, and the statute requires it to contain certain matters.

that time, but it is still, in effect, the New York standard. The New York form has been generally adopted by the insurance companies and is in common use in states which have not yet adopted a standard form.

§ 203. **The binding clause.**—All the states which require the use of a standard form, except North Carolina, prescribe penalties for using another form, and all but New York, New Hampshire and North Carolina make a policy issued in violation of the law binding on the company. The Massachusetts, Rhode Island and Utah statutes prescribe penalties for using other forms, "but said policy shall nevertheless be binding on the company using the same." Minnesota, North Dakota and South Dakota also provide,—"and such company shall thereafter be disqualified from doing business in the state."

Although the legislature requires insurance companies to use the standard form and provides that any contracts made contrary to its provisions shall be void, liability can not be escaped by the use of a form which in some slight respect departs from the standard. In Michigan it was said:[7] "Contracts of insurance, so far as the public are concerned, stand upon no different basis than other contracts. The object was to protect policy-holders, and to provide a policy fair to the insured and to the insurer and avoid litigation. It was undoubtedly well known to the legislature that policy-holders do not usually examine and scrutinize their policies with the same care that they do other contracts which they make involving their ordinary business transactions. The statute imposes a penalty upon the insurance company for issuing such a policy, but imposes none on the insured. In using the word 'void,' the legislature certainly did not contemplate that an insurance company might insert a clause not provided for in the standard policy, receive premiums year after year upon it, and, when the loss occurs, say to the insured, 'Your policy is void because we inserted a clause in it contrary to the laws of Michigan.' Such a result would be a reproach upon the legislature and the law. The law so construed, instead of operating to protect the insured, would afford the surest means to oppress and defraud them, and thus defeat the very object the legislature had in view. This statute comes clearly within that class of cases which holds the word 'void' to mean voidable."

[7] Armstrong v. Western, etc., Ins. Co., 95 Mich. 137 (1893).

§ 204. Construction of the standard policy.—The rule for the construction of the contract of insurance was established before the compulsory adoption of the standard form of policy. The theory is that as the policy is prepared by the insurance company it should be strictly construed in favor of the insured. When there is doubt as to the true construction to be given to the language, the court should lean against a construction which would limit the liability of the insurer.[8] It was said in a recent case, that conditions for the forfeiture of an insurance policy will be strictly construed against the insurer, where it retains the premium and seeks by such condition to escape liability after loss occurs.[9] It is well settled that written parts of the contract control the printed parts where there is a conflict, but this is also subject to the rule that words of exception in an insurance policy, if doubtful, are to be construed most strictly against the party for whose benefit they are intended.[10]

An insurance policy is an original independent agreement taking effect from its date, and its interpretation is not to be controlled or affected by prior policies of which it is technically the renewal.[11] The standard policy is a statutory law as well as a contract, and its provisions are therefore binding upon all the parties. In a recent case in Michigan[12] it was claimed that as the standard policy is prescribed by state authority, it should not be subject to the rule that such contracts are to be construed most favorably to the insured. The question was not determined, as it was said that the terms employed in the policy under consideration had been in previous use in insurance contracts and had received judicial construction. It is to be presumed that the terms used in the standard policy are used in the sense in which they were previously used and defined. In New York it was said:[13] "The policy, although of the standard

[8] Liverpool, etc., Ins. Co. v. Kearney, 180 U. S. 132 (1901); Home Ins. Co. v. Feyerabend, 7 Kan. App. 231, 52 Pac. 899 (1898); Georgia, etc., Ins. Co. v. Allen, 119 Ala. 436, 24 So. 399 (1898). A contract of insurance will, if possible, be construed to prevent a forfeiture: Bridges v. National Union, 73 Minn. 486, 77 N. W. 270, 409 (1898).

[9] Canton Ins. Office v. Woodside, 90 Fed. 301, 33 C. C. A. 63 (1898). See note to Lancaster F. Ins. Co. v. Lenheim, 33 Am. Rep. 783 (1879).

[10] Monroe, etc., Assn. v. Liverpool, etc., Ins. Co., 50 La. Ann. 1243, 24 So. 238 (1898).

[11] Temple v. Niagara F. Ins. Co., 109 Wis. 372, 85 N. W. 361 (1901).

[12] John Davis & Co. v. Insurance Co., 115 Mich. 382, 73 N. W. 393 (1897).

[13] Matthews v. American, etc., Ins. Co., 154 N. Y. 449, 39 L. R. A. 433

form, was prepared by the insurers, who are presumed to have had their own interests primarily in view; and hence, when the meaning is doubtful it should be construed most favorably to the insured, who had nothing to do with the preparation thereof. Moreover, when a literal construction would lead to a manifest injustice to the insured, and a liberal but still reasonable construction would prevent injustice by not requiring an impossibility, the latter should be adopted, because the parties are presumed, when the language used by them permits, to have intended a reasonable and not an unreasonable result."

In another recent case, commenting upon the standard policy, the New York court of appeals said:[14] "The act providing for a uniform policy, known as the standard policy, and which makes its use compulsory upon insurance companies, marks a most important and useful advance in legislation relating to contracts of insurance. The practice which prevailed before this enactment, whereby each company prescribed the form of its contract, led to great diversity in the provisions and conditions of insurance policies, and frequently to great abuse. Parties taking insurance were often misled by unusual clauses or obscure phrases concealed in a mass of verbiage, and often so printed as to almost elude discovery. Unconscionable defenses, based upon such conditions, were not infrequent, and courts seem sometimes to have been embarrassed in the attempt to reconcile the claims of justice with the laws of contracts. Under the law of 1886, companies are not permitted to insert conditions in policies at their will. The policies they now issue must be unifrom in their provisions, arrangement and type. Persons seeking insurance will come to understand to a greater extent than heretofore the contract into which they enter. Now, as heretofore, it is competent for the parties to a contract of insurance, by agreement in writing or parol, to modify the contract after the policy has been issued, or to waive conditions or forfeitures. The power of agents, as expressed in the policy, may be enlarged by usage of the company, its course of business, or by its consent, express or implied. The principle that courts lean against forfeitures is unimpaired; and in weighing evidence tending to show a waiver of conditions or forfeitures, the court may take into consideration the nature of the particular condition in question, whether

(1897); Rickerson v. Hartford, etc., Ins. Co., 149 N. Y. 307, 313 (1896) (construing Laws 1892, ch. 69, § 121).

[14] Quinlan v. Providence, etc., Ins. Co., 133 N. Y. 356, 31 N. E. 31 (1892).

a condition precedent to any liability, or one relating to the remedy merely, after a loss has been incurred. But where the restrictions upon an agent's authority appear in the policy, and there is no evidence tending to show that his powers have been enlarged, there seems to be no good reason why the authority expressed should not be regarded as the measure of his power; nor is there any reason why courts should refuse to enforce forfeitures plainly incurred which have not been expressly or impliedly waived by the company."

§ 205. Effect of a breach of condition.—The decisions are conflicting upon the question of the effect of a violation of a condition in a fire insurance policy. The weight of authority seems to support the view that a violation of a condition that works a forfeiture of the policy merely suspends the insurance during the violation, and if the violation is discontinued during the life of the policy and does not exist at the time of the loss, the policy revives and the company is liable, although it had never consented to the violation of the conditions in the policy, and such violation has been such that the company could, had it known of it at the time, have declared a forfeiture therefor.[15] But the decisions are not uniform; and a num-

[15] As sustaining the view that the policy is merely suspended, see Born v. Home Ins. Co., 110 Iowa 379, 81 N. W. 676, 80 Am. St. 300 (1900), annotated, where many of the following cases are cited:

Breach of condition as to mortgages: State Ins. Co. v. Schreck, 27 Neb. 527, 20 Am. St. 696, 43 N. W. 340 (1889); Omaha F. Ins. Co. v. Dierks, 43 Neb. 473, 61 N. W. 740 (1895); Johansen v. Home F. Ins. Co., 54 Neb. 548, 74 N. W. 866 (1898); Home F. Ins. Co. v. Johansen, 59 Neb. 349, 80 N. W. 1047 (1899); Tompkins v. Hartford F. Ins. Co., 22 App. Div. (N. Y.) 380, 49 N. Y. Supp. 184 (1897).

Breach of condition as to use of premises: New England, etc., Ins. Co. v. Wetmore, 32 Ill. 221 (1863); Schmidt v. Peoria, etc., Ins. Co., 41 Ill. 295 (1866); Insurance Co. v. McDowell, 50 Ill. 120, 99 Am. Dec. 497 (1869); Insurance Co. v. Garland, 108 Ill. 220–226 (1883); Traders' Ins. Co. v. Catlin, 163 Ill. 256, 45 N. E. 255 (1896); Lounsbury v. Protection Ins. Co., 8 Conn. 459 (1831); Phœnix Ins. Co. v. Lawrence, 4 Met. (Ky.) 9, 81 Am. Dec. 521 (1862); Joyce v. Maine Ins. Co., 45 Me. 168, 71 Am. Dec. 536 (1858); United States, etc., Ins. Co. v. Kimberly, 34 Md. 224, 6 Am. Rep. 325 (1870); Garrison v. Farmers', etc., Ins. Co., 56 N. J. L. 235, 28 Atl. 8 (1893); Cumberland Valley Mut. Protection Co. v. Schell, 29 Pa. St. 31 (1857); Mutual F. Ins. Co. v. Coatesville Shoe Factory, 80 Pa. St. 407 (1876); Krug v. German F. Ins. Co., 147 Pa. St. 272, 30 Am. St. 729, 23 Atl. 572 (1892); Hinckley v. Germania F. Ins. Co., 140 Mass. 38, 54 Am. Rep. 445, 1 N. E. 737 (1885);

ber hold that upon breach of a condition by which a forfeiture of the insurance may be declared, the policy becomes void and can never be restored to validity except with the consent of the insurer.[16] In

Wilkins v. Tobacco Ins. Co., 30 Ohio St. 317, 27 Am. Rep. 455 (1876); Hennessey v. Manhattan F. Ins. Co., 28 Hun (N. Y.) 98 (1882); Greenleaf v. St. Louis Ins. Co., 37 Mo. 25 (1865).

Breach of condition as to other insurance: New England, etc., Ins. Co. v. Schettler, 38 Ill. 167 (1865); Germania F. Ins. Co. v. Klewer, 129 Ill. 599 (1889); Western Assur. Co. v. Mason, 5 Ill. App. 141 (1879); Phenix Ins. Co. v. Johnston, 42 Ill. App. 66 (1891); Obermeyer v. Globe, etc., Ins. Co., 43 Mo. 573 (1869); Jacobs v. Equitable Ins. Co., 19 U. C. Q. B. 250 (1860).

Breach of condition as to occupancy: Insurance Co. v. Garland, 108 Ill. 220 (1883); Schuermann v. Dwelling House Ins. Co., 57 Ill. App. 200 (1894); Laselle v. Hoboken F. Ins. Co., 43 N. J. L. 468 (1881); Ring v. Phœnix Assur. Co., 145 Mass. 426, 14 N. E. 525 (1888); Ætna Ins. Co. v. Meyers, 63 Ind. 238 (1878); Whitney v. Black River Ins. Co., 72 N. Y. 117, 28 Am. Rep. 116 (1878).

By temporary alienation: Power v. Ocean Ins. Co., 19 La. 28, 36 Am. Dec. 665 (1841); Hitchcock v. Northwestern Ins. Co., 26 N. Y. 68 (1862); Lane v. Maine, etc., Ins. Co., 12 Me. 44, 28 Am. Dec. 150 (1835); Worthingham v. Bearse, 12 Allen (Mass.) 382, 90 Am. Dec. 152 (1866); Shearman v. Niagara F. Ins. Co., 46 N. Y. 526, 7 Am. Rep. 380 (1871).

[16] *As to mortgages:* German, etc., Ins. Co. v. Humphrey, 62 Ark. 348, 54 Am. St. 297, 35 S. W. 428 (1896); Insurance Co. v. Wicker, 93 Tex. 390, 54 S. W. 300, 55 S. W. 740 (1900).

As to use of premises: Fernandez v. Great Western Ins. Co., 48 N. Y. 571, 8 Am. Rep. 571 (1872); Burgess v. Equitable, etc., Ins. Co., 126 Mass. 70, 30 Am. Rep. 654 (1878); Carey v. German, etc., Ins. Co., 84 Wis. 80, 36 Am. St. 907, 54 N. W. 18 (1893); Mead v. Northwestern Ins. Co., 7 N. Y. 530 (1852); Jennings v. Chenango Ins. Co., 2 Den. (N. Y.) 75 (1846); Wheeler v. Traders' Ins. Co., 62 N. H. 450, 13 Am. St. 582 (1883); Kyte v. Commercial, etc., Assur. Co., 149 Mass. 116, 21 N. E. 361 (1888); Lyman v. State, etc., Ins. Co., 14 Allen (Mass.) 329 (1867); Hill v. Middlesex, etc., Assur. Co., 174 Mass. 542, 55 N. E. 319 (1899); Frost's, etc., Works v. Millers', etc., Ins. Co., 37 Minn. 300, 5 Am. St. 846, 34 N. W. 35 (1887); Imperial F. Ins. Co. v. Coos County, 151 U. S. 452, 14 Sup. Ct. 379 (1893).

By other insurance: Georgia Home Ins. Co. v. Rosenfield, 95 Fed. 358 (1899); Fabyan v. Union, etc., Ins. Co., 33 N. H. 203 (1856).

As to vacancy: Moore v. Phœnix Ins. Co., 62 N. H. 240, 13 Am. St. 556 (1882); East Texas F. Ins. Co. v. Kempner, 87 Tex. 229, 47 Am. St. 99, 27 S. W. 122 (1894).

The Michigan policy provides that the policy shall be void "if a loss shall occur on the property insured while such breach of condition continues or such breach of condition is the primary or contributory cause of the loss." The New Hampshire statute provides that "a change in the property in-

some states the insurance company is required, upon notice of a breach of a condition in the policy, to take some affirmative action to show that it does not intend to waive the forfeiture.[17]

A. Provisions Relating to Matters Before Loss.

I. *Formal Part of Contract.*

The ——— Insurance Company, in consideration of the stipulations herein named and of ——— dollars premium, does insure ——— for the term of ——— from the ——— day of ———, 19—, at noon, to the ——— day of ———, 19—, at noon, against all direct loss or damage by fire, except as herein provided, to an amount not exceeding ——— dollars, to the following described property while located and contained as described herein, and not elsewhere, to wit, ———.[18]

§ 206. **Parties.**—The capacity of individuals and corporations to become parties to contracts of insurance has already been considered.[19] If the wrong person is named as the insured, the policy may be reformed in equity.[20] The contract is personal, and refers to the person, and not to the thing out of which the interest arises.[21] Only the interest of the person named in the policy is covered by the con-

sured or in its use or occupation, or a breach of any of the terms of the policy by the insured, shall not affect the policy except while the change or breach continues."

[17] See Alabama, etc., Assur. Co. v. Long, etc., Co., 123 Ala. 667, 26 So. 655 (1899); Appleton Iron Co. v. British, etc., Co., 46 Wis. 23 (1879).

[18] This form has been followed in the standard policies of New York, New Jersey, Rhode Island, Connecticut, Louisiana, Iowa, Michigan, Wisconsin, South Dakota, North Dakota and North Carolina. The following is found in the standard policies of Massachusetts, Minnesota, Maine and New Hampshire: "In consideration of —— dollars to it paid by the insured, hereinafter named, the receipt whereof is hereby acknowledged, does insure —— and —— legal representatives against loss or damage by fire, to the amount of —— dollars. (Description of property insured.) * * * Said property is insured for the term of ——, beginning on the —— day of —— in the year —— at noon, and continuing until the —— day of —— in the year —— at noon, against all loss or damage by fire originating from any cause except * * * "

[19] § 10 *et seq., supra.*

[20] Spare v. Home, etc., Ins. Co., 15 Fed. 707, 19 Fed. 14 (1884).

[21] Cummings v. Cheshire, etc., Ins. Co., 55 N. H. 457 (1875).

tract, unless some form of words is used to express the contrary intention. This is not changed by an oral agreement with the agent at the time the policy is issued that it shall also cover interests of another person.[22] But where the person named as the insured knows that the company issued the policy under a mistaken idea that another person was being insured, the person named in the policy is not protected.[23] The mere fact that the name of the insured is misspelled, as Connor for O'Connor, is immaterial where the identity of the party is fairly shown.[24] Reference to the interest as "his," where the insured is a woman, is immaterial.[25] A policy procured by contractors issued in the name of the owner, with the clause "Contractors' insurance for thirty days," covers the interest of the contractors, and may be enforced for their benefit.[26] An unauthorized change of the name of an insured party will not, as a general proposition, affect the rights of the insured, but whenever "the insurer, in issuing a policy, deals with a party who remains in possession of the instrument after execution, and is alone entitled to recover the amount thereof in case of loss, he is authorized to assume that such party has the power to consent to such changes in it before breach as will inure to the benefit of the insured and tend to perfect the validity of the contract."[27] In this case the alteration neither injuriously affected the right of enforcing the policy nor changed the disposition of the money collectible thereon.

The name of the party insured is sometimes omitted from the policy and a general phrase, such as "for the account of whom it may concern," is used. So the insured is often described as agent, executor or trustee. The right of an appointee under a policy payable to him as his interest may appear is not an independent right on which such person is entitled to sue, but is a mere right to receive the whole or part of the money to which the insured may be entitled, and hence such a provision does not effect the insurer's discharge for breach of condition by the assured.[28]

[22] Fuller v. Phœnix Ins. Co., 61 Iowa 350 (1883).

[23] Travis v. Peabody Ins. Co., 28 W. Va. 583 (1886).

[24] Hibernia Ins. Co. v. O'Connor, 29 Mich. 241 (1874); Clark v. German, etc., Ins. Co., 7 Mo. App. 77 (1879).

[25] Simon v. Home Ins. Co., 58 Mich. 278 (1885).

[26] German F. Ins. Co. v. Thompson, 43 Kan. 567, 23 Pac. 608 (1890).

[27] Martin v. Tradesmen's Ins. Co., 101 N. Y. 498 (1886).

[28] Wunderlich v. Palatine F. Ins. Co., 104 Wis. 395, 80 N. W. 471 (1899).

§ 207. **The premium.**—The standard form provides that the amount of the premium shall be stated in the written contract. The necessity for the payment of this amount and the facts which constitute a waiver thereof have been already considered.[29]

§ 208. **Term of insurance.**—The standard form contemplates that dates which limit the term shall be inserted, but where this is not done, the insurance is nevertheless good for a reasonable time, and the burden is on the company to show that the policy was not in force at the time of the fire.[30] It may be shown by oral evidence that the policy was to take effect at a time other than its date.[31] The insurance begins when the policy is applied for and dated, although it is not delivered for some days thereafter.[32] The parties may agree that the termination of the insurance shall be at the option of the insured, and leave the date blank.[33] So, a contract may be given a retrospective operation and be made to cover property at a distance, although it has already been destroyed, where neither party has knowledge of the fact.[34] A policy "from the 14th day of February, 1868, until the 14th day of August, 1868," was held to cover a loss which occurred on the 14th day of August.[35] In the absence of an invariable custom to the contrary, a contract does not expire until midnight of the last day named.[36] The period may be limited by some other part of the policy. Thus, the policy covered a "frame shingle-roof hop house" while drying hops "from loss or damage by fire to the property so specified from the 15th day of October, 1875." Within the term, but after the insured had ceased drying hops, a fire occurred, and it was held that the company was not liable for damages caused thereby.[37] The party alleging a change in the date of the expiration of the policy after it was issued has the burden of proof.[38]

[29] See § 127, *supra*.

[30] Schroeder v. Trade Ins. Co., 109 Ill. 157 (1883).

[31] Atlantic Ins. Co. v. Goodall, 35 N. H. 328 (1857).

[32] Hubbard v. Hartford F. Ins. Co., 33 Iowa 325 (1871).

[33] Imboden v. Detroit, etc., Ins. Co., 31 Mo. App. 321 (1888).

[34] Security F. Ins. Co. v. Kentucky, etc., Ins. Co., 7 Bush (Ky.) 81 (1869).

[35] Isaacs v. Royal Ins. Co., L. R. 5 Exch. 296 (1870).

[36] Herald Co. v. Northern Assur. Co., 4 Mont. L. Rep. (Can.) 254 (1888).

[37] Langworthy v. Oswego, etc., Ins. Co., 85 N. Y. 632 (1881).

[38] Insurance Co. v. Brim, 111 Ind. 281, 12 N. E. 315 (1887).

§ 209. **The amount.**—There are but few opportunities for controversy as to the maximum amount of insurance, as this clearly appears in the policy. The measure of damages under special provisions of the contract and the valued-policy laws of the different states will be referred to elsewhere. If the policy is valued, the full amount named therein is recoverable in event of a total loss. This may result by force of a statutory provision, or from the express language of the policy in the absence of such a statute.

§ 210. **Description of the property—In general.**—The object of the descriptive clause is the identification of the property, and where this is clear parts which are false or erroneous may be disregarded.[39] Thus, where the property is erroneously described as a building of three stories instead of one and a half stories, it is sufficient if the building is identified by reference to the street and number so that the company can not have been misled.[40] Any ambiguity in the description written in the policy will be construed liberally in favor of the insured. It will cover not only what is specifically enumerated, but also what is necessarily appurtenant thereto.[41]

§ 211. **Goods held in trust.**—The word trust in this connection is to be given its ordinary popular and not its technical meaning.[42] Property described as "his own or held in trust" covers a piano left for sale or rent.[43] A policy "on his goods, stock in trade, etc., whether on commission or held in trust," covers goods in store or on joint account and sold for mutual profit of the insured and another party.[44] "The property of the insured or held in trust" includes cloth left with the insured to be manufactured into clothing.[45] So, an insurance on "merchandise generally and without exception either owned or held in trust, or on consignment in the warehouse of a commission or forwarding merchant," covers household furni-

[39] Hatch v. New Zealand Ins. Co., 67 Cal. 122 (1885).

[40] Massell v. Protective, etc., Ins. Co., 19 R. I. 565, 35 Atl. 209 (1896).

[41] Buchanan v. Exchange F. Ins. Co., 61 N. Y. 26 (1874); Lovewell v. Westchester F. Ins. Co., 124 Mass. 418, 26 Am. Rep. 671 (1878); Hannan v. Williamsburgh, etc., Ins. Co., 81 Mich. 556 (1890).

[42] Phœnix Ins. Co. v. Favorite, 49 Ill. 259 (1868).

[43] Snow v. Carr, 61 Ala. 363 (1878).

[44] Millaudon v. Atlantic Ins. Co., 8 La. 561 (1834).

[45] Stillwell v. Staples, 19 N. Y. 401 (1859).

ture and wearing apparel and books received and held on deposit subject to the order of the owner.[46]

§ 212. **May cover shifting stock.**—A policy upon a stock of goods covers as well additions made from time to time after the insurance was effected as those on hand when the policy was issued.[47] So, insurance upon merchandise in a store covers the stock as diminished and increased from time to time in the ordinary course of business.[48] As said in one case,[49] "Any other construction of a policy of insurance upon a stock in trade continually changing would render it worthless as an indemnity. It is a primary principle in the construction of the contract of insurance to give it effect as an indemnity which the parties to it designed." Thus, it was held that a policy on a stock of goods in a saloon which was being operated at the time the policy was issued covers newly purchased goods of the same character, not exceeding in value the amount insured.[50]

§ 213. **Ambiguous descriptions—Reformation.**—Where a misdescription of the property insured in a policy occurred through the mutual mistake of the parties, the policy may be reformed in equity;[51] but where a party accepts a policy without objection and makes no attempt to have the description corrected, he can not recover if the description can not be applied to the property destroyed.[52] Parol evidence is admissible to establish the identity and extent of the property covered by the policy of insurance and to explain any latent ambiguity in the description,[53] but a party can not by such evidence es-

[46] Siter v. Morrs, 13 Pa. St. 218 (1850).

[47] American, etc., Ins. Co. v. Rothchild, 82 Ill. 166 (1876).

[48] Peoria, etc., Ins. Co. v. Anapow, 51 Ill. 283 (1869); American, etc., Ins. Co. v. Rothchild, 82 Ill. 166 (1876); Planters' Mut. Ins. Co. v. Engle, 52 Md. 468 (1879); Kunzze v. American, etc., Ins. Co., 41 N. Y. 412 (1869); Sharpless v. Hartford F. Ins. Co., 140 Pa. St. 437 (1891); American, etc., Ins. Co. v. Rothchild, 82 Ill. 166 (1876).

[49] Hooper v. Hudson River F. Ins. Co., 17 N. Y. 424 (1858).

[50] Manchester F. Assur. Co. v. Feibelman, 118 Ala. 308, 23 So. 759 (1897).

[51] Carey v. Home Ins. Co., 97 Iowa 619, 66 N. W. 920 (1896).

[52] Goddard v. Monitor Ins. Co., 108 Mass. 56 (1871).

[53] Storer v. Elliot F. Ins. Co., 45 Me. 175 (1858); Bowman v. Agricultural Ins. Co., 59 N. Y. 521 (1875); Snow v. Carr, 61 Ala. 363 (1878); Wheeler v. Traders' Ins. Co., 62 N. H. 326 (1882).

tablish a new and different contract.[54] Thus, a contract relating to one subject can not be turned into a contract for a different subject by evidence that the agent of the company by mistake described the wrong property,[55] nor can a policy which in plain terms describes certain property be varied by parol evidence so as to show that only a particular interest was to be insured.[56] As a general proposition, there can be no recovery for property not described in the policy, unless it is shown that there was a mutual mistake or that the company is estopped to deny that the property claimed to be covered was not in fact that which is described in the policy.[57]

Where it was contended that the policy covered only the warehouse company's interest in the goods contained in the warehouse, the Supreme Court of the United States said:[58] "Blanket or floating policies are sometimes issued to factors or to warehousemen, intended only to cover margins uninsured by other policies, or to cover nothing more than the limited interest which a factor or warehouseman may have in the property which he has in charge. In those cases, as in all others, the subject of the insurance, its nature, and its extent are to be ascertained from the words of the contract which the parties have made. It is as true of policies of insurance as it is of other contracts, that, except when the language is ambiguous, the intention of the parties is to be gathered from the policies alone. There are cases in which resort may be had to parol evidence to ascertain the subject insured; but they are cases of latent ambiguity. * * * It is no exception to the rule that when a policy is taken out expressly 'for or on account of the owner' of the subject insured, or 'on account of whomsoever it may concern,' evidence beyond the policy is received to show who are the owners or who were intended to be insured thereby. In such cases the words of the policy fail to designate the real party to the contract, and, therefore, unless resort is had to extrinsic evidence, there it no contract at all. Turning, then, to the contract issued to the plaintiff below and construing it by the language used and the intention of the parties as plainly exhibited. Its words are, 'The Home Insurance Company insure Baltimore Warehouse Company

[54] Holmes v. Charlestown, etc., Ins. Co., 10 Metc. (Mass.) 211 (1845).

[55] Sanders v. Cooper, 115 N. Y. 279, 22 N. E. 212 (*sub nom.* Landers v. Cooper), 5 L. R. A. 638 (1889).

[56] Lancaster Mills v. Merchants', etc., Co., 89 Tenn. 1, 14 S. W. 317 (1890).

[57] Martin v. Farmers' Ins. Co., 84 Iowa 516, 51 N. W. 29 (1892).

[58] Home Ins. Co. v. Baltimore Warehouse Co., 93 U. S. 527 (1876).

against loss or damage by fire to the amount of $20,000, on merchandise hazardous or extra hazardous, their own or held by them in trust, or in which they have an interest or liability, contained in' a certain described warehouse. There is nothing ambiguous in this description of the subject insured. It is as broad as possible. The subject was merchandise stored or contained in a warehouse. It was not merely an interest in that merchandise." The court further said: "The parties to whom the policy was issued were warehouse keepers, receiving from various persons cotton and other merchandise on deposit. They were empowered by their charter to receive bailments and to make charges against the bailors for handling, labor and custody. They were also authorized to make advances upon the goods deposited with them, and their charges, expenses, advances, and commissions were made liens on the property. They had, therefore, an interest in the merchandise deposited with them, which they might have caused to be specifically insured. It was also at their option to obtain insurance upon the entire interest in the merchandise, whether held by them or by the depositors. Nothing in their charter forbids such insurance. It is undoubtedly the law that wharfingers, warehousemen and commission merchants, having goods in their possession, may insure them in their own names, and in case of loss may recover the full amount of insurance, for the satisfaction of their own claims first, and hold the residue for the owners. Such insurance is not unusual, even when not ordered by the owners of the goods, and when so made it inures to their benefit. And such insurance, we must hold, the warehouse company sought and obtained by the policy of the plaintiff in error. The words 'merchandise held in trust' aptly describe the property of the depositors. The warehouse company held the merchandise in trust for their customers,—not, it is true, as technical trustees, but as trustees in the sense that the goods had been intrusted to them."

§ 214. **Presumption as to nature of business.**—An insurance company is presumed to know the nature of the goods ordinarily kept by those engaged in a certain business,[59] and to have this, as well as the usual methods of carrying on the business, in mind when it issues the policy.[60] So, an agent of the company is presumed to be familiar

[59] Hall v. Insurance Co., 58 N. Y. 292 (1874).

[60] Wheeler v. Traders' Ins. Co., 62 N. H. 326, 415 (1882), citing authorities.

with the construction of the building insured and the company is charged with such knowledge.[61]

§ 215. Descriptions, when warranties.—Whether descriptions of the character and use of the insured property constitute a warranty will depend on the language of the contract. Unless the contrary intention clearly appears, the word "dwelling" in a policy will be construed as descriptive of the property, and not as a warranty that the building is then being occupied as a dwelling house.[62] So, a description of the property as a brick building is not a warranty that it is entirely constructed of brick.[63] Describing a building as a storehouse is not a warranty that it shall be used for no other purpose.[64] On the contrary, however, it has been held that a misdescription in a material respect is a breach of warranty without reference to the intention of the parties,[65] and that description of the use and occupation is a warranty.[66] Merely describing a house as a dwelling is not a warranty that it is occupied as such.[67] So, a statement that the building insured is used for the storage of ice is not a warranty that ice was stored there when the policy was issued.[68]

§ 216. Description of merchandise—What included in the description.—There are many cases from which we may determine what is included within particular descriptions. Thus, a policy on "a stock manufactured or in the process of manufacture" is held to cover unmanufactured stock.[69] A policy on "merchandise," such as is usually kept in country stores, covers hardware, china, glassware, etc., if such articles are commonly kept in such places.[70] A policy on a stock of

[61] Pettit v. State Ins. Co., 41 Minn. 299, 43 N. W. 378 (1889).

[62] Niagara F. Ins. Co. v. Johnson, 4 Kan. App. 16, 45 Pac. 789 (1896). *Contra*, Merwin v. Star F. Ins. Co., 72 N. Y. 603, 7 Hun (N. Y.) 659 (1878).

[63] Gerhauser v. North British, etc., Ins. Co., 7 Nev. 174 (1871).

[64] Franklin F. Ins. Co. v. Brock, 57 Pa. St. 74 (1868).

[65] Tesson v. Atlantic, etc., Ins. Co., 40 Mo. 33 (1867).

[66] Texas Ins. Co. v. Stone, 49 Tex. 4 (1878); Franklin F. Ins. Co. v. Martin, 40 N. J. L. 568 (1878).

[67] Browning v. Home Ins. Co., 71 N. Y. 508 (1877). But see Boyd v. Insurance Co., 90 Tenn. 212, 16 S. W. 470 (1891).

[68] Dolliver v. St. Joseph, etc., Ins. Co., 131 Mass. 39 (1881).

[69] Spratley v. Hartford Ins. Co., 1 Dillon (C. C.) 392 (1870).

[70] Franklin F. Ins. Co. v. Updegraff, 43 Pa. St. 350 (1862).

clothing, manufactured or in the process of manufacture, which contains a provision excluding liability "for loss for property owned by another party" does not include clothing belonging to another person taken to be manufactured under a contract by which it was to be at the manufacturer's risk.[71] A policy "on their stock of watches, watch trimmings, etc.," covers the entire stock, including plate, silverware, tools of the trade and such other goods as form part of similar stocks in the same city.[72] The words "stock in trade," as applied to the business of a baker, have a more extended meaning than when applied to the business of a merchant, and cover tools and implements necessary for the carrying on of the business, including a horse and cart.[73] Where the policy covered "rags and old metals," it was held that evidence was admissible to show that by the usage of the trade the terms had acquired a broader signification than applied to those words as commonly used.[74] Underwriters insuring by certain words may fairly be presumed to know the mercantile meaning of these words, and the fact of a widespread established use has at least a tendency to show that they had such knowledge. A policy upon a stock of "hair, wrought and in process, as a retail hair store," does not cover fancy goods made of other materials, although usually kept and sold in a retail hair store.[75] Insurance on jewelry and clothing constituting a stock in trade does not include such articles as musical instruments, surgical instruments, guns and books.[76] A policy on "English, American and West India goods" does not include teas and nutmegs.[77] Insurance on "a wholesale stock of drugs, paints, oils and dyestuffs and other goods not more hazardous, while contained in the three-story brick building," covers the entire stock of goods contained in such building.[78] A policy which insures the party as "a manufacturer of brass clockworks" covers all the articles ordinarily employed in such manufacture, although the keeping and use of certain articles is prohibited by the printed terms of the pol-

[71] Getchell v. Ætna Ins. Co., 14 Allen (Mass.) 325 (1867).

[72] Crosby v. Franklin Ins. Co., 5 Gray (Mass.) 504 (1855).

[73] Moadinger v. Mechanics' F. Ins. Co., 2 Hall (N. Y.) 490 (1829).

[74] Mooney v. Howard Ins. Co., 138 Mass. 375, 52 Am. Rep. 377 (1885).

[75] Medina v. Builders', etc., Ins. Co., 120 Mass. 225 (1876).

[76] Rafel v. Nashville, etc., Ins. Co., 7 La. Ann. 244 (1852).

[77] Huckins v. People's, etc., Ins. Co., 11 Fost. (N. H.) 238 (1855).

[78] Wilson Drug Co. v. Phœnix Assur. Co., 110 N. C. 350, 14 S. E. 790 (1892).

icy.[79] So, a policy on "all the articles making up the stock of a pork house and all within the building and appurtenant thereto," covers whatever belongs to the stock without reference to ownership of particular articles, notwithstanding the fact that there is a provision in the policy requiring goods on commission to be insured as such.[80] A policy insuring a railroad company on its wood and logs cut and piled along its line does not cover property belonging to other parties which is destroyed by sparks from the company's locomotives and for which it is responsible in damages.[81] The word "guano" includes fertilizer.[82] Whether flax is included in the term grain is for the jury to determine.[83] A policy on "freight cars owned or used by a railroad company" protects the cars of another road while in the possession of and used by the insured.[84] The word "machinery" includes all instruments intended to be operated exclusively by machinery in the business of the insured which are so used from time to time in the regular and ordinary prosecution of the business referred to in the policy, and covers movable dies worked by a press, which, when not in use, were deposited and kept on shelves.[85] Where the insured is permitted to occupy a portion of a warehouse for the purpose of rehandling tobacco, he may, on the destruction of the premises by fire, recover for the tobacco which was on hand and for sale.[86] A policy on a creamery building and merchandise, which consisted chiefly of butter and cheese, manufactured and in the process of manufacture, covers milk cans used in the business.[87] Millet hay is included in an insurance policy on "grain."[88] Carpets and bed clothing are covered by the term "household furniture."[89] Stationery and boxes of a glove manufacturer are not included in the term "all other kinds of implements."[90] A policy on "live stock" covers a horse

[79] Bryant v. Poughkeepsie, etc., Ins. Co., 17 N. Y. 200 (1858).

[80] Ætna Ins. Co. v. Jackson, 16 B. Mon. (Ky.) 242 (1855).

[81] Monadnock R. Co. v. Manufacturers' Ins. Co., 113 Mass. 77 (1873).

[82] Planters', etc., Ins. Co. v. Engle, 52 Md. 468 (1879).

[83] Hewitt v. Watertown F. Ins. Co., 55 Iowa 323 (1880).

[84] Commonwealth v. Hide, etc., Ins. Co., 112 Mass. 136 (1873).

[85] Seavey v. Central, etc., Ins. Co., 111 Mass. 540 (1873).

[86] Western Assur. Co. v. Ray, 20 Ky. L. 1360, 49 S. W. 326 (1899).

[87] Cronin v. Fire Ass'n, 112 Mich. 106, 70 N. W. 448 (1897).

[88] Norris v. Farmers', etc., Ins. Co., 65 Mo. App. 632 (1896).

[89] Patrons', etc., Soc. v. Hall, 19 Ind. App. 118, 49 N. E. 279 (1898).

[90] Stemmer v. Scottish, etc., Ins. Co., 33 Ore. 65, 49 Pac. 588, 53 Pac. 498 (1898).

acquired after the date of the policy.[91] A policy on the machinery of a paper mill was held to cover all machinery, tools and implements used in connection therewith in the manufacture of paper.[92] A policy on tools used "in the manufacture of boots and shoes" includes patterns for making tools.[93] A policy on eggs "in pickle" covers the eggs at any time while in store undergoing the process of pickling.[94] The insured were manufacturers of machinery, parts of which were made of cast iron, and the policy covered "their fixed and movable machinery, engines, lathes and tools." They were obliged to keep themselves supplied with wooden patterns in order to make the iron castings necessary to the completion of their machinery, and their practice was to send these patterns to various foundries from which they procured castings. It was held that it could not be shown by parol evidence that the parties intended to include patterns under the general term of tools. The court said: "The usual meaning of the word 'tool' is an instrument of manual operation—that is, an instrument to be used and managed by hand instead of being moved and controlled by machinery. We see no grounds for holding that these patterns are machines or parts of machines. As we understand the case presented, they, or some of them at least, were not raised or lowered by machinery, but were of such size and shape that they were applied and removed by hand. * * * We think, therefore, that, without doing any violence to the language of the policy, it may be interpreted as covering all patterns which from their size and shape admitted of being applied and managed by the hands of one man."[95] A policy covered "merchandise in a store and furniture and fixtures in a building" to be used by the assured as a "fancy goods and Yankee notion store." It contained provisions against certain hazardous and extra hazardous articles, but plaintiff was permitted to show that fireworks and firecrackers constituted an ordinary, usual, and recognized portion of a stock of fancy goods and Yankee notions, and were therefore covered by the policy.[96] A policy "on a stock in trade, being mostly chamber furniture in sets and other articles usually kept by

[91] Mills v. Farmers' Ins. Co., 37 Iowa 400 (1873).

[92] Buchanan v. Exchange F. Ins. Co., 61 N. Y. 26 (1874).

[93] Adams v. New York, etc., Ins. Co., 85 Iowa 6, 51 N. W. 1149 (1892).

[94] Hall v. Concordia F. Ins. Co., 90 Mich. 403, 51 N. W. 524 (1892).

[95] Lovewell v. Westchester F. Ins. Co., 124 Mass. 418, 26 Am. Rep. 671 (1878).

[96] Barnum v. Merchants' F. Ins. Co., 97 N. Y. 188 (1884).

furniture dealers," based on an application which is made a part of the contract, which described it as "household furniture, being my stock in trade, mostly chamber furniture in sets," covers paints and varnishes used in finishing furniture, although applicant, in answer to the question as to whether any highly inflammable matter was kept in or on the premises, answered "Not to my knowledge."[97] A policy on a stock of "paints, oils, brushes, blinds, and such other merchandise while contained in the second story of the frame building, etc.," was held to cover such articles as set tackle and fall, ropes, knives, cans, scales, etc., which were kept for use and not for sale.[98] The court said: "We think the term 'merchandise' not only may be, but often is, used as a synonym of goods, wares and commodities. * * * If used in an insurance policy to describe the goods of a merchant, it might, perhaps, be very properly limited to the goods intended for sale; if used for the same purpose to describe the goods of a painter, it might be held to cover property intended for use and not for sale." A policy on all the furniture contained in a brick building and additions attached covers furniture in a frame building on the next lot extending over against the rear of the brick building, and used in connection therewith as a storehouse.[99] A policy on lumber in a "yard" does not protect lumber in a clearing in a forest.[100]

§ 217. **Description of buildings.**—"The three-story granite building" is a proper description of a building with a granite front three stories in front and rear, although but one story in the middle.[101] "The frame building occupied as a tannery" does not include an engine and machinery.[102] A building twenty-five feet from a detached dwelling is not contiguous to it.[103] A policy describing the property as "buildings adjoined, and communicating, occupied * * * situated detached," does not mean that they are detached from each other, but that the whole house is detached from other buildings.[104] A

[97] Haley v. Dorchester, etc., Ins. Co., 12 Gray (Mass.) 545 (1859).

[98] Hartwell v. California Ins. Co., 84 Me. 524, 24 Atl. 954 (1892).

[99] Maisel v. Fire Ass'n, 69 N. Y. Supp. 181, 59 App. Div. (N. Y.) 461 (1901).

[100] Cook v. Loew, 69 N. Y. Supp. 614, 34 Misc. (N. Y.) 276 (1901).

[101] Medina v. Builders', etc., Ins. Co., 120 Mass. 225 (1876).

[102] Sunderlin v. Ætna Ins. Co., 18 Hun (N. Y.) 522 (1879).

[103] Olson v. St. Paul, etc., Ins. Co., 35 Minn. 432 (1886).

[104] Broadwater v. Lion F. Ins. Co., 34 Minn. 465 (1886).

policy on an "elevator building and additions" covers a warehouse standing two and one-half feet from the elevator building attached thereto by boards nailed to both buildings.[106] Whether counters and shelving are included in insurance upon a building depends upon whether they are movables or fixtures.[107] A policy on a building while in the process of construction covers the building after it is completed.[108] Where the property is described as "the Wolfe house," it may be shown by parol evidence that the parties intended to include a certain barn.[109] A "starch manufactory" includes machinery and fixtures necessary for the manufacture of starch.[110] A policy on a steam saw mill covers not only the building, but the machinery necessary to make it a steam saw mill in all its parts.[111] A policy on "an unfinished house" does not cover material which has been prepared for the house and deposited in an adjoining building,[112] but the word "house" in a policy includes whatever is appurtenant and necessary to a house as a building.[113] A policy on a barn, which, although an agricultural building, should not strictly have been described as a barn, but which, had there been a correct description, would have been insured at the same rate, is valid.[114] Machinery placed in a mill building and designed for a portion of the mill is real property within the meaning of a valued policy law.[115] A policy on a frame steam saw mill, with a specific amount on the "boiler, engine, machinery and belting contained therein," covers a planing mill in a shed on the same floor with the machinery proper and connected with it by belting.[116] Fixtures built into and forming a part of a building are covered by the policy, although such fixtures are included among others in a separate item covered by other insurance, where the indemnity on the latter

[106] Cargill v. Millers', etc., Ins. Co., 33 Minn. 90 (1885).

[107] Capital City Ins. Co. v. Caldwell, 95 Ala. 77, 10 So. 355 (1892).

[108] Frost's, etc., Works v. Millers', etc., Ins. Co., 37 Minn. 300, 5 Am. St. 846 (1887).

[109] Claffey v. Hartford F. Ins. Co., 68 Cal. 169 (1885).

[110] Peoria, etc., Ins. Co. v. Lewis, 18 Ill. 553 (1857).

[111] Bigler v. New York, etc., Ins. Co., 22 N. Y. 402 (1860).

[112] Ellmaker v. Franklin F. Ins. Co., 5 Pa. St. 183 (1847).

[113] Workman v. Insurance Co., 2 La. 507 (1830).

[114] Dobson v. Sotheby, Moody & M. 90 (1827).

[115] British, etc., Assur. Co. v. Bradford, 60 Kan. 82, 55 Pac. 335 (1898) (under ch. 102, Laws 1893).

[116] James River Ins. Co. v. Merritt, 47 Ala. 387 (1872).

item is not sufficient to cover the loss on the fixtures.[117] A policy describing a building as used for the manufacture of lead pipe covers wooden reels on which the pipe is coiled.[118] The words "pottery building," as descriptive of the property, do not cover a two-story brick boiler house, built at the end of but not connected by a door with a three-story brick building in which pottery is manufactured, where the lower part of the boiler house is used exclusively in connection with another and distinct business in a different building, although the second story is used for storing pottery.[119] The word "store" is equivalent to the word "shop," and properly describes a bakery and restaurant.[120] A structure which has been injured by fire may, while in its injured condition, be insured as a "building."[121] Permission to use a building for "mercantile purposes" does not permit its use as a restaurant.[122] The word "school-house" means a house or building in which school is kept, and is not restricted to a district school-house.[123] A cellar wall is a part of a building,[124] and in describing the building it is not necessary to refer to the cellar underneath the same.[125] The words "the two-story brick building" are sufficient to describe a building which is two stories in front and one in the rear.[126] A policy on a planing mill building and addition, and machinery, including shafting, gearing, belting, saws, tools, force pump and hose therein, covers an engine room from which motive power was furnished, which was situated twenty-two feet from the mill building and connected therewith by shafting for the transmission of power, and by a spout through which shavings were forced into the engine room.[127] The court said: "It conclusively appears that the engine in the engine room was the only mo-

[117] Niagara F. Ins. Co. v. Heenan, 181 Ill. 575, 54 N. E. 1052 (1899).

[118] Collins v. Charlestown, etc., Ins. Co., 10 Gray (Mass.) 155 (1857).

[119] Forbes v. American Ins. Co., 164 Mass. 402, 41 N. E. 656 (1895).

[120] Richards v. Washington, etc., Ins. Co., 60 Mich. 420 (1886).

[121] Hamburg, etc., Ins. Co. v. Garlington, 66 Tex. 103 (1886).

[122] Garretson v. Merchants', etc., Ins. Co., 81 Iowa 727, 45 N. W. 1047 (1890).

[123] Luthe v. Farmers', etc., Ins. Co., 55 Wis. 543 (1882).

[124] Ervin v. New York, etc., Ins. Co., 3 T. & C. (N. Y.) 213 (1874).

[125] Benedict v. Ocean Ins. Co., 31 N. Y. 389 (1865). See Ohage v. Union Ins. Co., 82 Minn. 426 (1901).

[126] Carr v. Hibernia Ins. Co., 2 Mo. App. 466 (1876).

[127] Home, etc., Ins. Co. v. Roe, 71 Wis. 33 (1888).

tive power for propelling any of the machinery in either of the buildings. The engine was used for no other purpose. It was therefore an essential part of the mill. Without it there would have been no complete mill. * * * Stress is laid upon the fact that the engine, which was the principal machine, was not specially mentioned in the policy, but we are inclined to think it was covered by the word machinery, and that other things were specifically enumerated for fear that they might not otherwise be included." A policy which covered "one two-story frame dwelling and additions thereto, occupied by the assured as a dwelling house," was held to cover a carriage house and stable under the same roof and in the rear of the portion occupied for dwelling purposes, but attached thereto.[128]

§ 218. **Location of property—In general.**—Under this provision, which is not found in the Massachusetts form, the property is insured while located as described "and not elsewhere." This is so definite that it would seem that there could be but little controversy as to its proper construction.[129] In a recent case it appeared that the policy was issued to a judge who was in the habit, while holding court in neighboring counties, of taking the insured property along with him for use in such other places. The court recognized the fact that a

[128] Hannan v. Williamsburgh, etc., Ins. Co., 81 Mich. 556 (1890). The court said: "I am not prepared to say that the words 'occupied as a dwelling house' as used in the policy of insurance necessarily exclude the idea that some part of the building may be used as a stable. If the family lived in the building it is not deprived of its character as a dwelling house because domestic animals were also housed there. Nor does this view conflict with the doctrine in English v. Franklin F. Ins. Co., 55 Mich. 273, cited by defendant's counsel. In that case the barn which it was sought to bring within the term 'dwelling house and additions thereto' was a separate building detached about forty feet from the dwelling, and there was in the policy that which made it clear to the learned judge who wrote the opinion that the barn was not intended to be included in the general term 'dwelling house.'"

[129] "The general doctrine is fully established that insurance of property in a certain place will not follow the property on its removal to a place different from that in which it was insured. Some courts have in some particulars qualified this general proposition, * * * but the general doctrine is recognized in all the cases." See extensive note to Benton v. Farmers' Mut. Ins. Co., 26 L. R. A. 237 (1894), on "Location of Movable Property as Affecting Fire Insurance Thereon."

number of cases construed somewhat similar language as being merely descriptive of the place at which the property is located at the time the insurance was obtained, and that others hold that such language must be construed with reference to the use of the property, and if this ordinarily causes it to be absent from such place, the company is liable. It was said: "However, in this policy the insurance company so definitely and unequivocally expresses a contract by which it is not bound for the loss of the property when absent from the place named that there is no room for construction. The protection afforded by the policy is expressly limited to the time that the subject of the insurance shall be in the house described, and whenever it was taken therefrom it was removed beyond the protection of the contract."[130]

§ 219. **Location material.**—A mere description of the place where the insured property is located, as a general rule, renders the location material to the risk, although it may be inferred that it is the intention of the parties that property of a certain character should be covered by the insurance while in ordinary use at other places. "As a rule," says Mr. Joyce,[131] "locality and place are essential, but in determining how far locality is important in describing property insured, reference must be had to the character of the property, to a consideration of what is the primary object in effecting insurance, and also to the fact to what uses the property insured would in all reasonable probability be put. So usage may be a controlling factor in the matter, as may also be the fact in the case of certain kinds of property, whether removal thereof is permanent or temporary. Where the policy is upon a class of property, the risk upon which from its particular character depends so much upon place or location, that the same constitutes an essential element of the contract, as in the case of a stock of goods or furniture 'contained in' a specified building, then such property will, as a rule, not be covered if changed or removed to another place or locality. The insurer, for various rea-

[130] British, etc., Assur. Co. v. Miller, 91 Tex. 414, 66 Am. St. 901, 29 L. R. A. 545 (1898); Green v. Liverpool, etc., Ins. Co., 91 Iowa 615 (1894); Mawhinney v. Southern Ins. Co., 98 Cal. 184 (1893); Haws v. St. Paul, etc., Ins. Co. (Pa.), 15 Atl. 915 (1888); L'Anse v. Fire Ass'n, 119 Mich. 427, 75 Am. St. 410 (1899).

[131] 2 Joyce Ins., § 1742. See Bradbury v. Fire Ins. Ass'n, 80 Me. 396 (1888); Lyons v. Providence, etc., Ins. Co., 14 R. I. 109, 51 Am. Rep. 362 (1883).

sons in cases of this character, might refuse to accept the risk altogether, or might accept it at an enhanced premium if he had known that its location was other than that designated, and the right of the insurer to know exactly what risk he is undertaking can not be denied. But if the primary object is to insure the property described, and the character of the property is such as to warrant that presumption, then its exact location may be a subordinate matter of more or less importance."

There is a line of cases which construe the statement that the insured property is "contained in" a certain place as descriptive merely of its location at the time the insurance was obtained. The descriptive words are construed with reference to the use of the property, and if this ordinarily causes it to be absent from such place, and while so absent it is destroyed, the property is nevertheless protected by the policy.[132]. Such descriptive words are thus held to amount merely to a warranty that the property is at the place designated at the time the policy is executed, but not that it will remain there. The insured thus has the right to the use of the property in the usual manner without losing his protection, and he may remove it temporarily if it be necessary in making such use of it.[133]

Thus, where the policy was upon a house, grain, hay and horses situated on section 22, it was held to cover the horses while in ordinary use on the farm or temporarily away from home.[134] So, a sealskin coat "contained in a frame dwelling," etc., was held covered by the policy while in a fur store, where it had been sent for repairs.[135] So, it was held that where the company insured farm horses, it assumed any risk arising from the ordinary use of the animals for farm purposes, although the risk was greater than that assumed while the animals were in the barn.[136] Insurance upon carriages "contained in" a described building "occupied as a livery and sales stable" covers a

[132] McCluer v. Girard, etc., Ins. Co., 43 Iowa 349, 22 Am. Rep. 249 (1876); Mills v. Farmers' Ins. Co., 37 Iowa 400 (1873); American, etc., Ins. Co. v. Haws (Pa.), 11 Atl. 107 (1887).

[133] Farmers', etc., Ins. Ass'n v. Kryder, 5 Ind. App. 430, 51 Am. St. 284 (1892). See, also, Bradbury v. Westchester F. Ins. Co., 80 Me. 396, 6 Am. St. 219 (1888).

[134] Peterson v. Mississippi Valley Ins. Co., 24 Iowa 494 (1868). To the same effect, see Mills v. Farmers' Ins. Co., 37 Iowa 400 (1873), where the horses were killed by lightning when six miles from home.

[135] Noyes v. Northwestern, etc., Ins. Co., 64 Wis. 415 (1885).

[136] Holbrook v. St. Paul, etc., Ins. Co., 25 Minn. 229 (1878).

carriage while undergoing repairs at a repair shop.[137] But the decisions are not uniform upon this question, as some courts construe the provision more strictly. Thus, where the policy insured plaintiff's "frame stable building, occupied by the assured as a hack, livery and boarding stable, situated on the north side of Court street, Auburn, Me.," it was held not to cover the loss of a hack while in a repair shop on another street, to which it had been removed before the fire without the knowledge and consent of the company.[138]

So, a policy on a fire engine, hose, hose-cart, while located and contained in the engine-house, "and not elsewhere," does not cover

[137] Niagara F. Ins. Co. v. Elliott, 85 Va. 962, 9 S. E. 694 (1889).

[138] Bradbury v. Fire Ins. Ass'n, 80 Me. 396, 15 Atl. 34, Woodruff's Ins. Cas. 170 (1888). The court said: "The general rule stated by text writers and held by the general current of decided cases, is that the place where the personal property insured is kept is of the essence of the contract, as by that the character of the risk is largely determined, and the property is covered by the policy only while in the place described: Wood Ins., p. 110; Blodgett Fire Ins., p. 22; Eddy Street Iron Foundry v. Hampden, etc., Ins. Co., 1 Cliff. (C. C.) 300 (1859); Maryland F. Ins. Co. v. Gusdorf, 43 Md. 506 (1875); Fitchburg R. Co. v. Charlestown, etc., Ins. Co., 7 Gray (Mass.) 64 (1856). The following cases are cited as an exception to the general rule and as sustaining the plaintiff's contention: Everett v. Continental Ins. Co., 21 Minn. 76 (1874); Holbrook v. St. Paul, etc., Ins. Co., 25 Minn. 229 (1878); McCluer v. Girard, etc., Ins. Co., 43 Iowa 349 (1876); Longueville v. Western Assur. Co., 51 Iowa 553 (1879); Lyons v. Providence, etc., Ins. Co., 13 R. I. 347 (1881). We think a careful examination of all these cases will show that the chattels insured were so described in the policy that they can be identified without reference to the building or place where they were kept, and the courts held that the words 'contained in' a certain building or kept in a certain building or place was a part only of the description of the chattel, and if, from its nature or character or ordinary use, the parties must have understood that it was to be out of the building or place a part of the time in ordinary use, the policy should be held to cover it while so out. This is going to the verge in construing the language used by the parties to the contract, when, ordinarily, it does not bear such meaning. But this case does not appear to us to be within the authority of those cases. * * * * The policies are similar to an insurance of a shopkeeper on his stock of goods in his shop, or of a railroad company on its rolling stock on its road, constantly changing. In such cases the property insured can be ascertained only from the place of business named: Lyons v. Providence, etc., Ins. Co., 13 R. I. 347 (1881). The policies insure such of the plaintiff's carriages, hacks, etc., as are contained in his stable at the time of the loss."

a loss on the property which was being used at the time to extinguish a fire several hundred feet from the fire-engine house.[139]

So, where the application requests insurance upon property "while on the premises only," and the policy covers farming utensils, and live stock on the described premises, and hay in stacks, it does not cover property taken temporarily for the purpose of plowing to a place twenty miles distant.[140] This case recognizes the rule that the property insured may sometimes be taken from the place described in the policy where it is of such a character that the use must have been within the contemplation of the parties, but holds that the language of this policy takes it out of the operation of the rule. A harvesting machine which is insured "while operating in the grain fields, and in transit from place to place in connection with harvesting," was held not protected while in a blacksmith's shop for the purpose of being repaired.[141]

Where the property is removed the policy is merely suspended, and if there is no loss and the property is returned it re-attaches.[142] The right of the company to deny liability where the property insured is specifically located in a given building, on the ground that it has been removed and was destroyed at a different place, may be waived by acts and declarations of the company after the loss showing an intention to relinquish such right after knowledge of removal.[143]

§ 220. **Illustrations.**—Where the policy insured household goods contained in a dwelling house, and they were burned while stored in a barn on the same premises, it was held that the knowledge of the company that the goods were so stored did not amount to a waiver of the provision in the policy.[144] Mr. Justice Cooley said: "The defendant merely undertook, for a certain consideration, the respon-

[139] L'Anse v. Fire Ass'n, 119 Mich. 427, 75 Am. St. 410 (1899); British, etc., Assur. Co. v. Miller, 91 Tex. 414, 66 Am. St. 901 (1898).

[140] Lakings v. Phœnix Ins. Co., 94 Iowa 476, 28 L. R. A. 70 (1895).

[141] Mawhinney v. Southern Ins. Co., 98 Cal. 184, 32 Pac. 945 (1893); Benicia Agri. Works v. Germania Ins. Co., 97 Cal. 468, 32 Pac. 512 (1893).

[142] British, etc., Assur. Co. v. Miller, 91 Tex. 414, 66 Am. St. 901 (1898).

[143] Montgomery v. Delaware Ins. Co., 55 S. C. 1, 32 S. E. 723 (1898).

[144] English v. Franklin F. Ins. Co., 55 Mich. 273, 54 Am. Rep. 377 (1884).

sibility while the goods were in the house, and it was at the plaintiff's option to have them there or elsewhere as he pleased. If they were lost by fire while elsewhere, the loss was not one against which the defendant had undertaken to insure him, nor was the defendant called upon to cancel the policy by reason of the goods being removed from the building where they were insured. If the dwelling house had been repaired and the goods restored to it, the policy would again have covered them; and this, for anything that appears to the contrary, may have been what both parties desired. At any rate, it does not appear that the plaintiff desired the policy canceled, and if it had desired it the cancellation would have been optional with the defendant." A policy upon the contents of a building, described in no other way, will not cover articles then contained in the building after they are removed and stored elsewhere.[145] A policy covering "oil while contained in a tank" in a certain location was held binding, although the tank had been swept away from such location by a flood.[147] A policy upon horses and colts "while in a barn, and by lightning only while in use or running in the pasture, while on his farm in the town of Le Seur, Minn.," covers loss by lightning at any place in the town.[148] Where a horse is insured "while in the barn or in the fields," it was held to be covered while in a barn built on the farm after the policy was issued.[150] A vessel insured while lying at a certain dock is not covered by the policy while moored outside in the river some 700 yards distant for the purpose of being refitted.[151] Where the policy described the goods as being "in the store part of the building," it was held not to cover loss of goods which had been removed to the second or third stories, which were not used for ordinary store purposes.[152] A policy on "furniture in a house" covers property stored in a garret which is not in common use.[153] Where the policy described the property as contained in the "frame dwelling house and bake-house, front and rear, situated at No. 17 Thomas St.," it did not

[145] Benton v. Farmers', etc., Ins. Co., 102 Mich. 281, 26 L. R. A. 237 (1894).

[147] Western, etc., Pipe Lines v. Home Ins. Co., 145 Pa. St. 346, 22 Atl. 665 (1891).

[148] Boright v. Springfield, etc., Ins. Co., 34 Minn. 352 (1885).

[150] Trade Ins. Co. v. Barracliff, 16 Vroom (N. J.) 543 (1883).

[151] Pearson v. Commercial, etc., Assur. Co., L. R. 1 App. Cas. 498 (1876).

[152] Boynton v. Clinton, etc., Ins. Co., 16 Barb. (N. Y.) 254 (1853).

[153] Clark v. Firemen's Ins. Co., 18 La. 431 (1841).

cover flour in a shed leading from the bake-house to the front house.[154] Wearing apparel described as contained in a certain building was not covered by the policy after it was removed to a place where the owner was residing. The removal was not such a temporary one as the parties might reasonably be supposed to have contemplated. The court said: "The ordinary use of clothing in such cases does not include the using involved in a long journey, or during a protracted visit, during which the goods may be exposed to risks that the insurer would not have been disposed to incur. It would be unreasonable to infer any intention of that kind."[155] But wearing apparel is insured while worn by the party in the streets of a city.[156] Where the insured desired to remove goods covered by the policy to another building and secured an indorsement on the policy to the effect that "it was transferred to cover similar property in the new building," and the goods were destroyed before they were removed, the company was held liable for the loss. The court said:[157] "The evidence clearly shows that the object was to continue the insurance until after their removal, and it appears to me to repel the idea that they should be uninsured in the meantime, while remaining in the place they were in while first insured." A policy covered goods in two places, one a sales-room and the other a storeroom, and the insured, wishing to remove the goods from the storage room to the sales-room, gave notice of the fact to the company, and obtained an indorsement upon the policy acknowledging notice of the fact that the goods "were being removed," and agreeing for a consideration that "the policy should cover the goods in both places during removal and thereafter in the last named locality only." It was held that "when this consent was obtained and indorsed upon the policy, it did not make it necessary for the assured to remove. They might avail themselves of the privilege they had purchased or they might refrain from so doing. If they did not move they lost the money they paid to secure the privilege, but they lost nothing more. Their policy was unaffected by the indorsement unless they acted under it. If they acted under it and entered on the work of removal they were not bound to suspend

[154] Moadinger v. Mechanics' F. Ins. Co., 2 Hall (N. Y.) 490 (1829).

[155] Towne v. Fire Ass'n, 27 Ill. App. 433 (1888).

[156] Longueville v. Western Assur. Co., 51 Iowa 553 (1879).

[157] Kunzze v. American, etc., Ins. Co., 41 N. Y. 412 (1869).

their business while that work was in progress and devote all their energies to the transfer of the goods. They had the right to continue to buy and ship, pending the removal, as well as before and after, just as they were in the habit of doing; and the policy covered concurrently with others the stock actually used in the ordinary way without regard to the specific articles of which it was composed. While the removal was in progress the protection of the policy was on each part of the stock according to its *pro rata* value. When the whole stock was transferred, the whole effect of the policy was transferred to the actual site of the stock. We think, therefore, that the indorsement did not limit the policy to the articles that were in the building from which they were to be removed at the time of the indorsement."[158] A policy insured against loss by fire a threshing machine, engine and separator "while not in use." The outfit had been in use, but was hauled to another place and left standing near a farm house preparatory for use, and a few days later was there destroyed by fire. It was held that the machines were not in use within the meaning of the policy.[159] So, insurance on a harvester while in use in "Tulare county" does not cover a loss which occurred while it was stored in a shed, not being actually used for harvesting purposes.[160]

§ 221. **Risks insured against.**—The policy insures "against all direct loss or damage by fire except as herein provided." These exceptions, which include explosions, lightning, fall of the building, invasion, and negligence after the fire, will be referred to hereafter. The restrictive word "direct" does not appear in the Massachusetts form. "Direct loss or damage by fire" means loss or damage accruing directly from fire as the destroying agency, in contradistinction to the remoteness of fire as such agency. The word "direct" means merely the immediate or proximate as distinguished from the remote cause.[162] Loss by fire means the result of the ignition of the property or of some substance near it. But it is not necessary that any

[158] Sharpless v. Hartford F. Ins. Co., 140 Pa. St. 437 (1891).

[159] Minneapolis, etc., Co. v. Firemen's Ins. Co., 57 Minn. 35, 58 N. W. 819 (1894).

[160] Slinkard v. Manchester F. Assur. Co., 122 Cal. 595, 55 Pac. 417 (1898).

[162] Ermentrout v. Girard, etc., Ins. Co., 63 Minn. 305, 56 Am. St. 481 (1895).

part of the insured property shall be actually ignited or consumed by fire.[163] Thus, in one case a house protected by a policy of insurance against damage by fire was injured by the falling of a part of the wall of an adjoining house, and it was held that fire was the proximate cause of the loss, and that the insurers were liable, although the house insured had never been on fire.[164] The word "fire" does not include heat of a degree too low to cause ignition, but actual ignition is not necessary, as the policy protects against all the direct consequences of actual ignition.[165] Where the property was injured by great heat occasioned by the closing of a register, and there was no ignition, it was held that the damage was not caused by fire within the meaning of the policy.[166] The rule is thus stated by Richards:[167] "A proximate result of fire within the rule of law establishing liability of the insurer may include other things than combustion; as, for example, injuries to the insured property by water from fire engines or exposure of goods during a fire, or during their reasonable removal, a loss of goods by theft during a fire or during a reasonable removal to a place of safety." Damage by water used in preventing the destruction of a building and its contents by fire is within a policy insuring against damage by fire.[168] So, a fire is the proximate cause of damage to goods which is suffered in the process of removal to save them from fire.[169] But such a policy does not protect against damage occasioned to the goods while being removed from a neighboring building under the apprehension of a spread of fire.[170]

A fire policy covers loss or damage by fire occasioned by explosion

[163] Transatlantic F. Ins. Co. v. Darsey, 56 Md. 70 (1880).

[164] Johnston v. West Scotland Ins. Co., 7 Shaw & D. 52 (1828); Ermentrout v. Girard, etc., Ins. Co., 63 Minn. 305 (1895).

[165] Gibbons v. German Ins., etc., Inst., 30 Ill. App. 263 (1888).

[166] Austin v. Drew, 6 Taunt. 435 (1816); Babcock v. Montgomery, etc., Ins. Co., 6 Barb. (N. Y.) 637 (1849); Scripture v. Lowell, etc., Ins. Co., 10 Cush. (Mass.) 356; 57 Am. Dec. 111 (1852).

[167] Richards Ins., § 128; White v. Republic, etc., Ins. Co., 57 Me. 91, 2 Am. Rep. 22 (1869); Stanley v. Western, etc., Ins. Co., L. R. 3 Exch. 74 (1868).

[168] John Davis & Co. v. Insurance Co., 115 Mich. 382, 73 N. W. 393 (1897).

[169] Balestracci v. Firemen's Ins. Co., 34 La. Ann. 844 (1882); Lewis v. Springfield, etc., Ins. Co., 10 Gray (Mass.) 159 (1857).

[170] Hillier v. Allegheny, etc., Ins. Co., 3 Pa. St. 470, 45 Am. Dec. 656 (1846).

or any other cause not expressly excepted in the policy.[171] In an elaborate decision in which many cases are reviewed, Mr. Justice Cushing said:[172] "The rule should be that where the effects produced are the immediate results of the action of the burning substance in contact with a building, it is immaterial whether these results manifest themselves in the form of combustion or explosion, or of both combined. In either case the damage occurring is by the action of fire and covered by the ordinary terms of the policy against loss by fire." Damage by fire caused by a break in pipes resulting from a boiler explosion within the building is not covered by a policy which provides that the company shall not be liable for loss caused by explosion unless fire ensues, and in that event for the damage by fire only.[173] A lamp is not a fire within the meaning of a policy covering damages by fire or lightning, and there can be no recovery for damages caused by smoke therefrom when no ignition occurs outside of the lamp.[174] There can be no recovery for overheating caused by the unskillful use of fire in a factory, where there is no combustion.[175] Where fire is employed as an agent, either for ordinary purposes of heating the insured building, or for the purposes of manufacture, or as an instrument of art, the company is not liable for the consequences so long as the fire itself is confined within the limits of the agencies employed. Hence under a policy insuring against all direct loss or damage by fire, the insurer is not liable for damages arising from smoke or soot coming from a defective stove-pipe, and resulting from a fire intentionally built in a stove and kept confined therein, nor for damage caused by water used in cooling portions of the building heated by such stove-pipe, when the use of such water is not necessary to prevent ignition. In order to bring such consequences within the risk there must be actual ignition outside of the agencies employed, not purposely caused by the insured, and the consequence of such ignition *dehors* the agencies.[176] In a

[171] Germania Ins. Co. v. Sherlock, 25 Ohio St. 33 (1874).

[172] Scripture v. Lowell, etc., Ins. Co., 10 Cush. (Mass.) 356, 57 Am. Dec. 111 (1852).

[173] John Davis & Co. v. Insurance Co., 115 Mich. 382, 73 N. W. 393 (1897).

[174] Fitzgerald v. German, etc., Ins. Co., 62 N. Y. Supp. 824, 30 Misc. (N. Y.) 72 (1899).

[175] Scripture v. Lowell, etc., Ins. Co., 10 Cush. (Mass.) 356, 57 Am. Dec. 111 (1852). See generally, note to 36 Am. St. 857.

[176] Cannon v. Phœnix Ins. Co., 110 Ga. 563, 78 Am. St. 124 (1900). See, also, Gibbons v. German Ins., etc., Inst., 30 Ill. App. 263 (1889).

recent case in Massachusetts[177] it was held that the company was liable for damages caused to the insured goods by smoke and soot escaping from the stove in which the fire had been built for ordinary purposes. It was contended that the policy was not intended to apply to a fire which is lighted and maintained for ordinary purposes for which fires are used in buildings, and which is confined to its place thus fitted for such fires. But Mr. Justice Knowlton said: "We are not disposed to question the soundness of the general principle upon which this contention is founded, and we find it by no means easy to determine whether the principle should be extended far enough to cover an occasional fire in a chimney incidental to the ordinary use of the stove, or whether such a fire should be held one for whose unexpected injurious consequences an insurance company should be liable. We are inclined to the opinion that a distinction should be made between a fire intentionally lighted and maintained for a useful purpose in connection with the occupation of a building and a fire which starts from such a fire without human agency, in a place where fires are never lighted nor maintained, although such ignition may naturally be expected to occur occasionally as an incident to the maintenance of necessary fires, and although the place where it occurs is constructed with a view to prevent damage from such ignition. A fire in a chimney should be considered rather a hostile fire than a friendly one, and as such, if it causes damage, it is within the provisions of ordinary contracts of fire insurance."

A policy on a tug and her fixtures insuring against loss or damage by fire does not cover injury to the interior of her boiler caused by overheating or leaking of water. The terms of the policy in this case, said the court, "are such as are ordinarily employed in fire policies on steam vessels where the risk is taken on the hull and all the machinery and appurtenances of the vessel. And it is conceded that for any injury done by fire to any part of the vessel or to the machinery, whether to the boiler or to any other part, if the injury was done by ignition or heat generated beyond the furnace, where fire was intended to burn, the insurance company would be liable. But the subject of insurance here necessarily excepts the operation of fire to some extent. The subject of the policy is a steam tug, her boiler and

[177] Way v. Abington, etc., Ins. Co., 166 Mass. 67, 55 Am. St. 379 (1896). See further, extended notes to Gilson v. Delaware, etc., Canal Co., 36 Am. St. 857 (1892); Hillier v. Allegheny, etc., Ins. Co., 45 Am. Dec. 656, 55 Am. St. 379 (1846).

other machinery. Of necessity fire was to be maintained in the furnace and in contact with the boiler as a means to generate the motive power by which the vessel could be propelled. The burning or warping of the bars of the grate in the furnace, if produced by the action of fire, could hardly be supposed to be within the scope of the risk insured against, however general the terms of the policy. And if that be true of the furnace, it is difficult to perceive why it is not equally true of such parts of the boiler as are brought in contact with the fire in the furnace or heat evolved therefrom. The fire, while in the furnace, was in its proper place, and where it was intended to be; and it was placed there to act upon the boiler, which in the course of time would be burned out or warped as the grate in the furnace would be by the continued action of fire thereon. And if such results of the action of fire upon these materials, while in ordinary use, are not within the risk it would be difficult to see upon what degree of heat or under what conditions the liability under the policy would attach for the injury caused by the action of fire while contained in the furnace and producing no external ignition. If a person has his house insured against loss or damage by fire, and he should make a fire in his grate or fire-place of such intense heat as to crack his chimney or to warp or crack his mantel-pieces, it could hardly be contended that he could hold the insurance company liable for such damage and for damage so unintentionally allowed to be produced by the action of fire. In such a case the fire would not have extended beyond the proper limits within which it was intended to burn, but the heat emitted therefrom would have produced effects not intended by the insured. No doubt there are many instances where the insurer has been held liable for injury done to buildings or furniture by heat or smoke without actual ignition, where the heat or smoke is produced from fire outside of the limits of the place in which it was intended by the contract of insurance to burn. But that is a different question from that presented."[178]

§ 222. **Proximate cause—Electric wires.**—In an action upon a policy insuring a building, machinery, dynamos and other electric fixtures of an electric company, it appeared that the fire produced a short circuit in the wires connecting with a part of the building remote from the fire, and that such short circuit caused such a strain

[178] American Towing Co. v. German F. Ins. Co., 74 Md. 25, 21 Atl. 553 (1891).

on the machinery as to break it to pieces. The fire occurred in the wire tower of the building, through which the wires for electric lighting were carried from the building. It was extinguished without contact with other parts of the building, with but slight damage to the tower and its contents. It was held that the damage was "loss or damage by fire" within the meaning of a policy.[179] The court said: "The subject-matter of the insurance was the building, machinery, dynamos and other electrical fixtures, besides tools, furniture and supplies used in the business of furnishing electricity for electric lighting. The defendants, when they made their contracts, understood that the building contained a large quantity of electrical machinery and that electricity would be transmitted from the dynamos, and would be a powerful force in and about the building. They must be presumed to have contemplated such effects as fire might naturally produce in connection with the machinery used in generating and transmitting strong currents of electricity." After considering the general rule that the active efficient cause that sets in motion a train of events which brings about a result, without the intervention of any force started and working actively from a new and independent source, is the direct and proximate cause, the court said: "If this was an action against one who negligently set the fire in the tower and thus caused the injury to the machinery, it is clear on the theory of the plaintiff that the negligent act of setting the fire would be deemed the active efficient cause of the disruption of the machinery and consequent injury to the building. It remains to inquire whether there is a different rule in an action on a policy of fire insurance. * * * In suits brought on a policy of fire insurance it is held that the intention of the defendants must have been to insure against losses where the cause insured against was a means or agency in causing the loss, even if it was entirely due to some other active efficient cause which made use of it or set it in motion, if the original efficient cause was not itself made a subject of separate insurance in the contract between the parties. For instance, when the negligent act of the insured or of anybody else causes a fire and so causes damage, although the negligent act is the direct, proximate cause of the damage through fire, which was the passive agency, the insurer is held liable for the loss caused by fire. This is the only particular in which the rule in regard to remote and proxi-

[179] Lynn, etc., Co. v. Meriden F. Ins. Co., 158 Mass. 570, Woodruff Ins. Cas. 178 (1893).

mate causes is applied differently in actions on fire insurance policies from the application of it in other actions. A failure sometimes to recognize this rule as standing on independent grounds and established to carry out the intention of the parties to the contract of insurance has led to confusion of statement in some of the cases. The difficulty of applying the general rule in complicated cases has made the interpretation of some of the decisions doubtful, but on principle and by the weight of authority in many well-considered cases, we think it is clear that, apart from the single exception above stated, the question, What is the cause which creates a liability? is to be determined in the same way in actions upon policies of fire insurance as in other actions. * * * In the present case the electricity was one of the forces of nature, a passive agent working under natural laws, whose existence was known when the insurance policies were issued. Upon the theory adopted by the jury, the fire worked through agencies in the building—the atmosphere, the metallic machinery, electricity and other things—and working precisely as defendants would have expected it to work if they had thoroughly understood the situation and laws applicable to the existing conditions, it put a great strain on the machinery and did great damage. No new cause acting from an independent source intervened. The fire was the direct and proximate cause of the damage according to the meaning of the words 'direct and proximate' by the best authorities."

II. Authorization of Agent.

In any matter relating to this insurance, no person, unless duly authorized in writing, shall be deemed the agent of this company.[180]

§ 223. **Agency.**—The subject of agency has already been considered. This clause attempts to make a writing the only evidence of agency. Ordinarily a fire insurance agent is given a written commission which in general language defines his authority, but the in-

[180] This provision is found in the standard policies of New York, New Jersey, Connecticut, Rhode Island, Louisiana, Iowa, North Dakota, South Dakota and North Carolina. The provision is not found in the standard policies of Maine, New Hampshire, Wisconsin, Massachusetts and Minnesota. The Michigan policy provides that: "In any matter relating to *the procuring of* this insurance, no person, unless duly authorized in writing, shall be deemed the agent of this company."

surer does not, by virtue of this provision of the standard policy, escape responsibility for acts of those who are in fact its agents, although they may not be able to show written authority. The rule established by the weight of authority, as stated by May, and quoted with approval by Richards,[181] is that: "It makes no difference that the policy declares the agent to be the agent of the assured and not of the company. For whom a person is acting is a matter of law on the facts of every case. The application precedes the policy; and to hold that a provision in the after-coming policy, unknown to the assured at the time of the application, could turn the insurance agent into *his agent,* when he thought all the time he was dealing with him and accepting his advice as the agent of the company, would be an outrage." Any other rule would permit an insurance company to relieve itself from all responsibility for the mistakes or misconduct of its agents, by the simple device of sending them out without written authorization. The matter has been regulated by statute in some of the states, and this provision of the policy must be read in connection with such statutes. This clause may properly be regarded as notice to the insured that it is unsafe to deal with a person who can not show written authority, but agency is a fact, and may be proven by any competent evidence.

III. Application and Survey.

If an application, survey, plan or description of the property be referred to in this policy, it shall be a part of this contract and a warranty by the insured.[182]

[181] Richards Ins., 171; Kausal v. Minnesota, etc., Ins. Ass'n, 31 Minn. 17, 47 Am. Rep. 776 (1883); Allen v. German, etc., Ins. Co., 123 N. Y. 6 (1890); Insurance Co. v. Norton, 96 U. S. 234 (1877). See § 160, *supra.*

[182] This provision appears in the standard policies of New York, New Jersey, Connecticut, Rhode Island, Wisconsin, Iowa, Louisiana, North Dakota, South Dakota, and North Carolina. Michigan adds the words, "as to material facts." The clause does not appear in the Maine, Massachusetts, and Minnesota standard policies. It does not appear in the New Hampshire standard policy, but chapter 170 of the Public Statutes of New Hampshire, which is printed on the back of the policy and forms a part thereof, provides that: "Descriptions of property and statements concerning its value and the title of the insured thereto in an application of insurance or in an insurance policy shall not be treated as warranties."

§ 224. **Application a part of the policy.**—A reference in the policy to an application, survey, plan or description of the property makes it a part of the contract and warrants its correctness. The clause is not contained in the Massachusetts form, and in that state only such parts of the application as are set forth in the policy become a part of the contract. The language probably extends the established rule by making a mere reference sufficient, which was not enough under the earlier decisions.[183] But the reference must still be of such a character as to show an intention to incorporate the matter into the contract. Thus, the entire application is not made a part of the policy which contains this provision by a statement in the policy that the property is situated in a specified place, "as per diagram filed with application," where such diagram was put on the back of the application after it had been signed by the applicant.[184]

The materiality of the matters thus warranted must be determined by general and statutory rules, to which reference has already been made.[185]

IV. *Misconduct of Insured in Procuring Policy.*

This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning the insurance or the subject thereof; or if the interest of the insured in the property be not truly stated herein; or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after the loss.[186]

§ 225. **Entirety of contract.**—Under the old forms there were many cases which held that an insurance contract was severable where distinct items were insured for separate amounts, although but

[183] Vilas v. New York, etc., Ins. Co., 72 N. Y. 590, 28 Am. Rep. 186 (1878).

[184] La Belle v. Norwich F. Ins. Soc., 34 N. B. (Can.) 515 (1898).

[185] See §§ 116, 119, *supra*.

[186] This provision is found in the standard policies of New York, New Jersey, Connecticut, Rhode Island, Wisconsin, Louisiana, Iowa, North Dakota, South Dakota, Michigan, and North Carolina. The following provision appears in the standard policies of Massachusetts, Minnesota, Maine, and New Hampshire: "This policy shall be void if any material fact or circumstance stated in writing has not been fairly represented by the insured, or if the insured shall make any attempt to defraud the company either before or after the loss." Nothing is said concerning a misrepresentation of interest.

one premium was paid. The decisions are very conflicting; but probably the weight of authority is to the effect that such a contract is entire and that breach of a warranty which relates solely to one class of property will avoid the entire policy.[188] Under this provision of the standard policy there is little room for controversy. Where a policy which covered a barn and its contents contained a provision that under certain conditions "this entire policy and every part thereof shall be void," and there was a misdescription as to the amount of the incumbrances, the court said:[189] "It is urged by the respondent that this contract of insurance is severable, that the insurance on the barn should be deemed one contract, the insurance on its contents another contract, and that a misstatement in respect to the amount for which the realty was incumbered does not invalidate the insurance on the personalty, and that defendant, having asked the court to rule that no part of the loss could be recovered, asked for too much in the instruction prayed for and in its motion for a nonsuit, and that exceptions to these rulings are unavailable. Under forms of policies quite different from the one in the case at bar, insuring specific amounts on separate items of property, contracts have been held severable. It is expressly stipulated in this policy that if either the real or personal property or any part of it be incumbered it

[187] Taylor v. Anchor, etc., Ins. Co. (Iowa), 88 N. W. 807 (1902), and cases there cited; Merrill v. Agricultural, etc., Ins. Co., 73 N. Y. 452 (1878); Schuster v. Dutchess Co. Ins. Co, 102 N. Y. 260 (1880). As to the severability of contracts of insurance, see note to Wright v. London F. Ins. Ass'n (Mont.), 19 L. R. A. 211 (1893).

[188] In Southern F. Ins. Co. v. Knight, 111 Ga. 622, 78 Am. St. 216 (1900), after a review of many cases, the court said: "Our conclusion is, that where an insurance policy is issued in consideration of a gross premium, and provides that the policy shall be void in the event of a certain condition therein named, and this condition is broken, no recovery can be had on the policy, though separate classes of property are therein insured, and though the stipulation violated relates solely to a matter which could have no connection with but one of these classes."

[189] Smith v. Agricultural Ins. Co., 118 N. Y. 518 (1890); Geiss v. Franklin Ins. Co., 123 Ind. 172 (1889). In Pratt v. Dwelling House, etc., Ins. Co., 130 N. Y. 206 (1891), the court said: "Whatever the rule may be elsewhere, it is settled in this state that where insurance is made upon different kinds of property, each separately valued, the contract is severable, even if but one premium is paid, and the amount insured is the sum total of the valuations." See Loomis v. Rockford Ins. Co., 77 Wis. 87 (1890); McQueeny v. Phœnix Ins. Co., 52 Ark. 257 (1889).

must be so represented to the company in the application, otherwise the entire policy and every part of it shall be void. This policy is quite different in its legal effect from those considered in the cases cited, it not being expressly provided in those policies as in this that a misrepresentation of the situation of one of the subjects insured should invalidate the insurance on all other property covered by the policy." In Missouri it was held that the clause making the "entire policy void, in case of breach of condition in any respect," does not render the policy indivisible so as to preclude any recovery on it in case it is for convenience made to cover different kinds of property which are separately valued, although but one premium is paid. The court said:[190] "When this contract was made it was the settled

[190] Trabue v. Dwelling House Ins. Co., 121 Mo. 75, 23 L. R. A. 719 (1894). In McGowan v. People's, etc., Ins. Co., 54 Vt. 211, Woodruff Ins. Cas. 205 (1881), it appeared that the policy covered both real and personal property. The real estate was conveyed in violation of a condition in the policy and it was claimed that this did not affect the insurance upon the personal property which was situated in the dwelling house insured. The court said: "This is a question of great practical importance, as a large proportion of insurance contracts embrace more than one item of property insured. The decisions are apparently conflicting; but we think are easily reconciled by referring to the plain principles which should govern them. The general rule, 'void in part, void *in toto*,' should apply to all cases where the contract is affected by some all-pervading vice, such as fraud or some unlawful act, condemned by public policy or the common law; cases where the contract is entire and not divisible; and all those cases where the matter that renders the policy void in part, and the result of its being so rendered void, affects the risk of the insurer upon the other items in the contract. Keeping these rules in mind, the leading cases on this subject can all be reconciled. A recovery should be had in all those cases where the contract is divisible; the different properties insured for separate sums; and the risk upon the property, which is claimed to be valid, unaffected by the cause that renders the policy void in part. Such are the cases of Howard, etc., Ins. Co. v. Cornick, 24 Ill. 455 (1860); Hartford F. Ins. Co. v. Walsh, 54 Ill. 164 (1870); Clark v. New England, etc., Ins. Co., 6 Cush. (Mass.) 342 (1850); Date v. Gore, etc., Ins. Co., 14 Up. Can. C. P. 548 (1864); Phœnix Ins. Co. v. Lawrence, 4 Metc. (Ky.) 9 (1862); Loehner v. Home, etc., Ins. Co., 17 Mo. 247 (1852); Koontz v. Hannibal, etc., Ins. Co., 42 Mo. 126 (1868); Cucullu v. Orleans Ins. Co., 9 Mar. (La.) 6. The cases following have held the contract entire,—indivisible, and no recovery could be had upon them: Hinman v. Hartford F. Ins. Co., 36 Wis. 159 (1874); Associated F. Ins. Co. v. Assum, 5 Md. 165 (1853); Bowman v. Franklin F. Ins. Co., 40 Md. 620 (1874); Fire Ass'n v. Williamson, 26 Pa. St. 196 (1856); Gottsman v. Pennsylvania Ins. Co.,

rule of decision in this state that such a contract as this was divisible or severable, although the policy had a clause which would avoid the whole contract. The addition of the word 'entire' given its utmost latitude could not avoid any more than the whole policy; hence it added nothing to the policy."

§ 226. **Concealment and misrepresentation.**—This clause makes no changes in the general rules governing the effect of concealment and misrepresentation. It simply declares the existing law, and its only importance here is in connection with the evident intention that the contract shall not be treated as severable, but that the entire policy shall be rendered void by concealment or misrepresentation in connection with any material matter.[191]

§ 227. **Statement of interest.**—In the absence of any provision requiring a statement of the interest of the insured, the extent and nature of such interest need not be disclosed, and it will be sufficient for him to show an insurable interest at the time of the loss.[192] The applicant may state simply that he is the owner if this is true in any substantial sense.[193] This clause does not require the applicant to state the value of his interest or whether it is subject to incumbrances or liable to be terminated.[194] The word "interest" is broader than title.[195]

§ 228. **Fraud and false swearing.**—The entire policy is rendered void by fraud or false swearing either before or after the loss. But mere mistake in the expression of an opinion, or an innocent misstatement, will not work a forfeiture under this provision. It must

56 Pa. St. 210 (1867); Bleakley v. Niagara, etc., Ins. Co., 16 Grant (Up. Can.) 198 (1869). In the case at bar the whole property was insured for $872, divided into specific items, but one premium was paid and one premium note given. We think the authorities justify us in holding that the contract was an entire one; separate and distinct only so far as to limit the extent of the risk assumed by the company on each kind of property."

[191] See ch. VI.

[192] See § 45, *supra;* Buffum v. Bowditch, etc., Ins. Co., 10 Cush. (Mass.) 540 (1852).

[193] Wainer v. Milford, etc., Ins. Co., 153 Mass. 335 (1891).

[194] Dolliver v. St. Joseph, etc., Ins. Co., 128 Mass. 315, 35 Am. Rep. 378 (1880); Carson v. Jersey City, etc., Ins. Co., 43 N. J. L. 300, 39 Am. Rep. 584 (1881).

[195] Lee v. Agricultural Ins. Co., 79 Iowa 379 (1890).

be false and fraudulent.[196] Thus, a false statement as to the value of the property will not invalidate the policy if given in good faith and as an honest expression of opinion.[197] A concealment or misstatement relative to the value of the property is sometimes held to be immaterial where the policy is not valued. Thus, in one case it was said: "By the terms of the policies it is expressly provided that the companies were not liable beyond the actual cash value of the property at the time of the loss. The policies were not valued, but were open policies, and the companies were liable only for the actual value of the property lost. In such policies an overvaluation of the property is immaterial. If such representation in such a policy is not material to the risk, does not increase the risk in any way, we fail to see any reason for saying that because the insured was at the time the company's agent, such representation by him was material."[198] Overvaluation, however great, is not conclusive evidence of fraud. It is at the most merely presumptive evidence of fraudulent intent and is strong in proportion to the excess.[199] Thus, where there was testimony that misstatements in the proof were made by mistake, it was held error to take the case from the jury, as the policy was only rendered void by willful false swearing with the intent to defraud.[200] Where the policy contained a warranty and provided that "false representations by the assured of the conditions, situation, or occupancy of the property or any omission to make known any fact material to the risk, or any overvaluation or misrepresentation whatever, either in the written application or otherwise, shall make the policy void," it appeared that there was a clear overvaluation, and thus a breach of warranty. The court said:[201] "The trial court erred in submitting the question of overvaluation simply as one of fraud or good faith, and in stating to the jury that if the applicant placed a value on the property which he honestly believed to be its legitimate

[196] Titus v. Glens Falls, etc., Ins. Co., 81 N. Y. 410 (1880).

[197] Baker v. State Ins. Co., 31 Ore. 41, 48 Pac. 699 (1897); Phenix Ins. Co. v. Pickel, 119 Ind. 155, 21 N. E. 546 (1889).

[198] Insurance Co. v. Osborn, 26 Ind. App. 88, 59 N. E. 181 (1901).

[199] Sturm v. Atlantic, etc., Ins. Co., 63 N. Y. 77 (1875); Insurance Co. v. Coombs, 19 Ind. App. 331, 49 N. E. 471 (1898).

[200] Petty v. Mutual F. Ins. Co., 111 Iowa 358, 82 N. W. 767 (1900).

[201] Fowler v. Ætna F. Ins. Co., 6 Cow. (N. Y.) 673 (1827), 16 Am. Dec. 460 and note; Boutelle v. Westchester F. Ins. Co., 51 Vt. 4, 31 Am. Rep. 666 (1878); Carson v. Jersey City F. Ins. Co., 14 Vroom (N. J.) 300, 39 Am. Rep. 584 (1881).

value, it would not render the policy void, although larger than the value of the property as estimated by others. Doubtless a very slight variation should be disregarded, but I think the applicant must be held responsible for any substantial excess when he thus warrants the value." Under this provision of the standard policy it is held in Michigan that the contract is not necessarily avoided because of a false statement in the affidavit, given by the assured after the loss, that a sewing machine was burned, which he explained by saying that he thought it was burned at the time he made the affidavit, but subsequently found it was not in the building.[202] Where the policy contained a provision that any fraud or false swearing should forfeit all claims under it, and the plaintiff in his proofs of loss stated under oath that the building was occupied as a dwelling house and for no other purpose, the words were held to mean a verified false assertion, fitted and likely to, and which does, deceive.[203] But it appeared that the defendant, through its agents and secretary, knew the facts; and as the words used, when charged with the meaning given them by the parties, were not true as between them, there was no breach of the condition. The defendant could not be deceived by an assertion which to its own knowledge was false. Under this provision, false swearing in the proofs of loss in regard to the burning of wearing apparel, which has been removed from the building insured before the loss, renders the policy void as to insurance on the house and household furniture as well as that on the wearing apparel.[204]

V. *Excluded Risks.*

This company shall not be liable for loss caused directly or indirectly by invasion, insurrection, riot, civil war or commotion, or military or usurped power, or by order of any civil authority, or by theft; or by neglect of the insured to use all reasonable means to save and preserve the property at and after a fire or when the property is endangered by fire in neighboring premises; or (unless fire ensues, and, in that event, for the damage by fire only) by explosion of any kind, or lightning; but liability for direct damage by lightning may be assumed by specific agreement hereon.

If a building or any part thereof fall, except as the result of fire,

[202] Knop v. National F. Ins. Co., 107 Mich. 323, 65 N. W. 228 (1895).

[203] Maher v. Hibernia F. Ins. Co., 67 N. Y. 283 (1876).

[204] Fowler v. Phœnix Ins. Co., 35 Ore. 559, 57 Pac. 421 (1899).

*all insurance by this policy on such building or its contents shall immediately cease. * * **

Nor, beyond the actual value destroyed by fire, for loss occasioned by ordinance or law regulating construction or repair of buildings, or by interruption of business, manufacturing processes, or otherwise.[205]

§ 229. **Invasion, riot, etc.**—An invasion is the hostile entrance of an armed force into a certain territory, and any loss to the insured property of which the invasion is the efficient cause is not within the protection of the policy.[206] There can be no recovery in such case, although the commanding officer of the invading party did not order the property destroyed.[207] An insurrection is a "seditious rising against the government; a rebellion; a revolt."[208] A riot is an unlawful act done or attempted to be done by three or more persons, either with or without common cause, or it may be a lawful act done in a violent or tumultous manner. It is immaterial whether or not there is a previous unlawful assembly, or whether the rioters originally assembled for a lawful purpose. Force or violence, or some acts tending thereto, calculated to cause terror to one or more, are necessary in criminal law, although there may be a riot without actual violence. In insurance cases it is not necessary to first establish the fact of a riot by a judgment of a criminal court.[209]

[205] These provisions are found in the standard policies of New York, New Jersey, Connecticut, Rhode Island, Wisconsin, Louisiana, Iowa, North Dakota, South Dakota, Michigan, and North Carolina. The standard policies of Massachusetts, Minnesota, Maine and New Hampshire insure against all loss or damage by fire originating from any cause except "invasion, foreign enemies, civil commotions, riots or any military or usurped power whatever; the amount of said loss or damage to be estimated according to the actual value of the insured property at the time when such loss or damage happens, but not to include loss or damage caused by explosions of any kind unless fire ensues, and then that caused by fire only." They also provide that if "the insured property be exposed to loss or damage by fire, the insured shall make all reasonable efforts to save and protect the same."

[206] Ætna F. Ins. Co. v. Boon, 95 U. S. 117 (1877); Portsmouth Ins. Co. v. Reynolds, 32 Gratt. (Va.) 613 (1880).

[207] Barton v. Home Ins. Co., 42 Mo. 156, 97 Am. Dec. 329 (1868).

[208] Spruill v. North Carolina, etc., Ins. Co., 1 Jones (N. C.) 126 (1853).

[209] Joyce Ins., § 2581; Lycoming F. Ins. Co. v. Schwenk, 95 Pa. St. 89, 40 Am. Rep. 629 (1880); Germania F. Ins. Co v. Deckard, 3 Ind. App.

The form of policy excepts the risks of civil war or commotion. Lord Mansfield says that the words "civil commotion" were introduced in 1727, and are as general and untechnical as any that can possibly be used. He distinguishes between civil commotion and invasion by usurped military power and says: "I think a civil commotion is this: an insurrection of the people for a general purpose, though it may not amount to a rebellion while there is usurped power."[210]

"Usurped power" may mean an invasion from abroad or internal authority conducted by authority, and not the power of a common mob.[211]

A loss caused by the burning of a bridge by the order of the military authorities to prevent the advance of an armed force of rebels is not excepted by the clause, "loss by fire occasioned by mobs or riots," although it would be within other clauses of this provision.[212]

A policy contained a provision that the company "shall not be liable to make good any loss or damage by fire which may happen or take place by means of any invasion, insurrection, riot, or civil commotion, or of a military or usurped power." A certain town in Missouri was attacked by a Confederate military force; and an officer in command of the United States forces, after a battle had been in progress for some time, being unable to successfully defend the city, set fire to some military stores to prevent them from falling into the hands of the enemy. The fire spread through two intermediate buildings to the store containing the insured goods, and they were destroyed. The Connecticut court held that the clause did not refer to the lawful acts of military authorities, but only to acts of persons in hostility to the lawful authorities, and that the act of the commander in ordering the firing of the building was a lawful act and

361, 28 N. E. 868 (1891); State v. Dean, 71 Wis. 678, 38 N. W. 341 (1888).

[210] Langdale v. Mason, reported in 2 Marsh. Ins. (ed. 1810) 791.

[211] Drinkwater v. London Assur. Corp., 2 Wilson 363 (1767); City F. Ins. Co. v. Corlies, 21 Wend. (N. Y.) 367 (1839); Barton v. Home Ins. Co., 42 Mo. 156, 97 Am. Dec. 329 (1868); Ætna F. Ins. Co. v. Boon, 95 U. S. 117 (1877). In Strauss v. Imperial F. Ins. Co., 94 Mo. 182, 4 Am. St. 368 (1887), the words "notorious resistance to lawful authority" were held to mean such an unusual and extraordinary state of affairs that the ordinary civil authorities were overpowered.

[212] Harris v. York, etc., Ins. Co., 50 Pa. St. 341 (1865).

not within the exception of the policy.[213] But the Supreme Court of the United States held that the fire which destroyed the goods was excepted from the risk assumed. Mr. Justice Strong said:[214] "The general purpose of this proviso is clear enough, but there is a controversy respecting the extent of the exemption made by it. It has been very strenuously argued that the words 'military or usurped power' must be construed as meaning military *and* usurped power; that they do not refer to military power of the government, lawfully exercised, but to usurped military power, either that exerted by an invading foreign enemy or by an internal armed force in rebellion, sufficient to supplant the laws of the land and displace the constituted authorities. There is, it must be admitted, considerable authority and no less reason in support of this interpretation. In our view of the present case, however, we are not called upon to affirm positively that such is the true meaning of the words in the connection in which they were used in the policy now under review; for if it be conceded that it is, we are still of opinion that the fire which destroyed the premises of the plaintiffs below 'happened,' 'took place,' or occurred by means of a risk excepted in the policy. In other words, it was caused by 'invasion,' and the usurped military power of a rebellion against the government of the United States, as the contracting parties understood the terms 'invasion' and 'military or usurped power.'"

§ **230. Theft.**—This provision, which excepts loss by theft, is binding.[215] Where there is no such provision an insurer against fire only is liable for goods stolen during their removal to avoid impending loss by an adjoining fire. A clause to the effect that the company "will not be liable for damage to goods contained in show windows, when the damage is caused by a light in the window, nor shall the company be liable for loss by theft," applies only to theft from the windows, and not theft occurring while the property is necessarily being removed to avoid fire.[216]

Where it was provided that "in case of fire or of loss or damage thereby it should be the duty of the assured to use his best endeavors

[213] Boon v. Ætna F. Ins. Co., 40 Conn. 575 (1874).

[214] Ætna F. Ins. Co. v. Boon, 95 U. S. 117 (1877).

[215] Liverpool, etc., Ins. Co. v. Creighton, 51 Ga. 95 (1874).

[216] Leiber v. Liverpool, etc., Ins. Co., 6 Bush (Ky.) 639 (1869).

for saving and preserving the property," it was held that the company was liable for the value of the goods lost or stolen in the process of removal in accordance with this provision.[217] Where the policy made it the duty of the insured to "use all diligence in the removal and preservation of the property, and, in case of failure on his part so to do, the company would not be liable for loss or damage sustained in consequence of such neglect," and while complying with this provision there was a loss by theft, it was held that there was no liability on the part of the company for the loss under the provision that "this company shall not be liable to make good any loss by theft; or any loss or damage by fire which may happen or take place by means of any invasion, insurrection, riot, or civil commotion, or any military or usurped power." The clause relating to theft was treated as an independent provision.[218]

§ 231. **Neglect to protect property.**—Unless expressly provided to the contrary, a policy covers damage occasioned by the negligence of the insured or his representatives. This provision imposes upon him the duty to use reasonable care to save and preserve the property at and after a fire, or when the property is endangered by fire existing in the neighborhood. In a case where the policy contained a similar provision, and it was alleged that the loss was occasioned by the "neglect to use all possible efforts by the plaintiff to save and preserve the property when exposed to fire," it was held error to refuse a request that plaintiffs could not recover for any loss or damage occasioned by their or either of their neglect to use all possible efforts to save or preserve the property when on fire or exposed thereto. It was said that the request "was almost in the precise words of the condition, and although the condition was not set up in the answer as a defense, the issue had been tendered in the complaint as to its breach and the question was one which affected the amount of damages to be recovered even if the defendant failed to sustain his defense to the action."[219]

§ 232. **Explosion.**—In the absence of a provision imposing liability there has been much conflict of authority as to the liability of the

[217] Independent, etc., Ins. Co. v. Agnew, 34 Pa. St. 96 (1859). See, also, Tilton v. Hamilton F. Ins. Co., 14 How. Pr. (N. Y.) 363 (1857); Newmark v. Liverpool, etc., Ins. Co., 30 Mo. 160 (1860).

[218] Webb v. Protection, etc., Ins. Co., 14 Mo. 3 (1851). See, also, Witherell v. Maine Ins. Co., 49 Me. 200 (1861); Fernandez v. Merchants', etc., Ins. Co., 17 La. Ann. 131 (1865).

[219] Ellsworth v. Ætna Ins. Co., 89 N. Y. 186 (1882).

insurer for loss caused by a fire which results from an explosion. In the leading early case in New York the policy contained a condition that the insurer should not be liable for loss caused by the explosion of a steam boiler. As a result of explosion fire was brought in contact with the insured property, which was consumed. It was held that the loss was within the exception and that the company was not liable.[220] The same conclusion was reached in Ohio under slightly different form of policy. It appeared that an inflammable vapor was formed in the course of the business of rectifying spirits, which came in contact with an ordinary gas jet and resulted in an explosion, which was followed by fire.[220a] A later case in the same state would seem to be in conflict, but the court attempts to make a distinction between the two cases.[221]

So, the United States Supreme Court held that under a similar exemption there was no liability where the explosion took place in a building across the street which resulted in an extensive fire, which destroyed several blocks of buildings, including the warehouse in which the insured property was stored. The court said:[222] "The only question was whether the fire happened or took place by means of the explosion, for if it did the defendant was not liable by the express terms of the policy."

The contrary rule has been established in Illinois[223] and Penn-

[220] St. John v. American, etc., Ins. Co., 11 N. Y. 516 (1854). In Hayward v. Liverpool, etc., Ins. Co., 3 Keyes (N. Y.) 456 (1867), the policy expressly excepted liability for subsequent fire. In Briggs v. North American, etc., Ins. Co., 53 N. Y. 446 (1873), under a policy which contained the standard clause, it appeared that vapor from the works came in contact with the flame of a lamp, and an explosion ensued which nearly destroyed the building and machinery. A fire resulted which caused some damage, slight when compared with that caused by the explosion, and it was held that the company was not liable for the loss caused by the explosion. It was suggested, however, that if the building had been on fire and an explosion had occurred in the course of the conflagration, the rule might have been different. So in Mitchell v. Potomac Ins. Co. (U. S.), 22 Sup. Ct. 22 (1901), a lighted match which came in contact with a vapor and caused an explosion was not a "fire" within the meaning of a policy which excludes liability for explosion.

[220a] United, etc., Ins. Co. v. Foote, 22 Ohio St. 340 (1872).

[221] Boatman's, etc., Ins. Co. v. Parker, 23 Ohio St. 85 (1872).

[222] Insurance Co. v. Tweed, 7 Wall. (U. S.) 44 (1868).

[223] Commercial Ins. Co. v. Robinson, 64 Ill. 265 (1872); Heuer v. North-Western, etc., Ins. Co., 144 Ill. 393 (1893).

sylvania.[224] In the latter state it was said: "Careful examination of the question convinces me that the exception covered by this section is to be restricted to losses arising from explosions rather than extended to the much broader ground of losses by fire originating from explosions."

Where the policy excluded liability for damage caused by explosion, it was held that there was no liability where powder in another building was struck by lightning and the insured house was destroyed.[225] "The conclusions stated," said the court, "are sustained by abundant authority. True it is that cases are to be found which declare principles of construction which, if applied here, would make the company liable for this loss if its liability were measured wholly by the lightning clause, but in no case which has come under our observation, and we have examined a great many, has liability been found to attach where there was a provision excluding liability for loss by explosion and the loss was caused by fire, or as here by lightning taking effect in a distant building, and the damage being wrought to the insured property by an explosion produced by the fire or lightning without either of the latter agencies coming in contact with the property."

The standard form provides for liability for damages occasioned by fire which results from explosion, and exempts the insurer from liability for damages caused by the explosion itself. The loss by explosion must be distinguished from that caused by the subsequent fire.[226] Under this provision the insurer is liable for the loss where the explosion is the result of an antecedent fire.[227] Damage to property resulting immediately from an explosion of gunpowder caused by the application of fire is within the provision of the policy which exempts the company from liability for loss caused by explosion unless fire ensues, and then only for loss or damage by fire.[228]

[224] Heffron v. Kittanning Ins. Co., 132 Pa. St. 580, 20 Atl. 698 (1890).

[225] German F. Ins. Co. v. Roost, 55 Ohio St. 581, 45 N. E. 1097, 60 Am. St. 711 (1897).

[226] Briggs v. North British, etc., Ins. Co., 66 Barb. (N. Y.) 325 (1872); Briggs v. North American, etc., Ins. Co., 53 N. Y. 446 (1873). See generally, Transatlantic F. Ins. Co. v. Dorsey, 56 Md. 70, 40 Am. Rep. 403 (1880); Waldeck v. Springfield, etc., Ins. Co., 53 Wis. 129 (1881), 56 Wis. 96 (1882); Smiley v. Citizens' Ins. Co., 14 W. Va. 33 (1878).

[227] Washburn v. Miami Valley Ins. Co., 2 Fed. 633 (1880). See Waters v. Merchants', etc., Ins. Co., 11 Pet. (U. S.) 213 (1837).

[228] Phœnix Ins. Co. v. Greer, 61 Ark. 509, 33 S. W. 840 (1896). See Mitchell v. Potomac Ins. Co. (U. S.), 22 Sup. Ct. 22 (1901).

§ 233. **Lightning.**—Under the standard policy a company is not responsible for damages caused by lightning when not assumed by specific agreement attached to or indorsed on the policy, unless fire results from the lightning, and then the responsibility is limited to the damages occasioned by the fire. Under a policy which insured a building generally against loss by fire, which contained a separate clause declaring the insurer should be liable for fire by lightning, the company was held not liable where it appeared that the building was struck by lightning and destroyed but there was no ignition or combustion.[229]

§ 234. **Fall of building.**—The object of this clause is thus stated by Mr. Justice Gray:[230] "The manifest intent and purpose of the clause inserted in each of these policies, by which it is provided that 'if the building shall fall, except as the result of a fire, all insurance by this corporation on it or its contents shall immediately cease and determine,' is that the insurance, whether upon the building or upon its contents, should continue only while the building remains standing as a building, and shall cease when the building has fallen and become a ruin. When substantially all the floors and the roof of a building used as a store-house fall, leaving nothing standing but the outer walls and perhaps a staircase, the building must be deemed to have fallen. When several buildings or the goods therein are insured by the same policy, the fall of one building terminates the policy, at least on that building or its contents." Before the company can be held liable it must appear that the building fell as a result of fire, not that the fire resulted from the fall of the building.[231]

[229] For an elaborate discussion of the subject of liability for damage caused by lightning, see Babcock v. Montgomery, etc., Ins. Co., 4 N. Y. 326 (1850). Where the policy indemnified against loss from any accidental damage "excepting only damage by fire or lightning," it was held to cover damage resulting from a "sudden rise of water" or a flood: Hey v. Guarantors', etc., Co., 181 Pa. St. 220, 59 Am. St. 644 (1897).

[230] Huck v. Globe Ins. Co., 127 Mass. 306 (1879).

[231] Transatlantic F. Ins. Co. v. Dorsey, 56 Md. 70, 40 Am. Rep. 403 (1880). But the company was held liable where only about three-fourths of the building fell, and what was left was afterwards destroyed by fire which was communicated from the adjoining building: Breuner v. Liverpool, etc., Ins. Co., 51 Cal. 101, 21 Am. Rep. 703 (1875). See Ermentrout v. Girard, etc., Ins. Co., 63 Minn. 305 (1895). See, also, Fireman's Fund Ins. Co. v. Sholom, 80 Ill. 558 (1875), where it was held that the building had not fallen when by a windstorm it had been moved partly from the posts upon which it had rested and so far rendered

A policy covered loss or damage on a building by fire originating from any cause, with the reservation that "if the building shall fall except as a result of fire all insurance by this company on it or its contents shall immediately cease and determine." The insured claimed that the explosion was caused by an antecedent fire, and the company that the explosion was the destroying agency, followed by fire. It was held that whether ignition of the explosive substance was by a negligent or unlawful fire, or by an innocent fire not having in itself a destructive tendency, the scientific fact must be recognized that such explosions are preceded by ignition and accompanied by intense heat, and that it could not be said as a matter of law that the loss was not covered by the policy.[232] There is no liability for loss in case the building is blown down by wind before the fire has reached the insured goods, although the building is on fire at the time.[233] Where the policy describes the premises as a "two-story and basement frame, gravel roof, ironclad building, foundations, and all permanent fixtures," and provides that if the building or any part thereof fall except as a result of fire, all insurance shall immediately cease, the insured can not recover for the destruction of the basement by fire after the building was blown down by a wind storm, on the theory that the basement or any part of it did not fall except as a result of fire.[234]

Under this provision there can be no recovery where fire breaks out in the debris after the collapse of the structure.[235] In a case where, after the fall of a part of the building, the remainder was destroyed by fire, the court said:[236] "We can not say that the fall of two-fifths of the ice-house, leaving the other three separate compartments standing intact, was a fall of the building within the terms

unfit for occupancy that the most of the furniture had been removed. In Huck v. Globe Ins. Co., 127 Mass. 306 (1879), it was held that the building had fallen; since nothing remained standing but the outer walls, and an elevator five feet square in one corner.

[232] Renshaw v. Fireman's Ins. Co., 33 Mo. App. 394 (1889).

[233] Fred J. Kiesel & Co. v. Sun Ins. Office, 88 Fed. 243, 31 C. C. A. 515 (1898).

[234] Teutonia Ins. Co. v. Beard, 74 Ill. App. 496 (1897).

[235] Liverpool, etc., Ins. Co. v. Ende, 65 Tex. 118 (1885); Nave v. Home, etc., Ins. Co., 37 Mo. 430, 90 Am. Dec. 394 (1866); Huck v. Globe Ins. Co., 127 Mass. 306, 34 Am. Rep. 373 (1879).

[236] Security Ins. Co. v. Mette, 27 Ill. App. 324 (1888). See, also, Breuner v. Liverpool, etc., Ins. Co., 51 Cal. 101 (1875); Leonard v. Orient Ins. Co., 109 Fed. 286, 48 C. C. A. 369, 54 L. R. A. 706 (1901).

of the condition; otherwise there is no halting point short of the proposition that the fall of any substantial part of the building puts the condition in operation and terminates the risk."

§ 235. **City ordinances.**—The parties are presumed to contract in view of city ordinances, and where a building is partly destroyed, and the application to repair is refused by the city authorities, it will be deemed a total loss.[237]

VI. Excluded Property.

*This company shall not be liable for loss to accounts, bills, currency, deeds, evidences of debt, money, notes, or securities; nor, unless liability is specifically assumed hereon, for loss to awnings, bullion, casts, curiosities, drawings, dies, implements, jewels, manuscripts, medals, models, patterns, pictures, scientific apparatus, signs, store or office furniture or fixtures, sculpture, tools, or property held on storage or for repairs; * * * nor for any greater proportion of the value of plate glass, frescoes, and decorations than that which this policy shall bear to the whole insurance on the building described.*[238]

§ 236. **Exceptions and limitations.**—Certain articles are expressly excepted from the contract of insurance, and the only questions left are those of construction.[239] After it appears that there has been a loss by fire, the burden is upon the insurer to show that certain articles fall within the exceptions.[240] If the articles thus excepted are included in the description of the property insured, the written provision controls. Thus, "patterns" are excluded by this clause, but under a policy insuring "fixed and movable machinery, engines, lathes and tools," wooden patterns which from their size and shape

[237] Hamburg, etc., F. Ins. Co. v. Garlington, 66 Tex. 103 (1886).

[238] This provision is found in the standard policies of New York, New Jersey, Connecticut, Rhode Island, Wisconsin, Louisiana, Iowa, North Dakota, South Dakota, Michigan, and North Carolina. The following provision appears in the standard policies of Massachusetts, Minnesota, Maine, and New Hampshire: "Bills of exchange, notes, accounts, evidences and securities of property of every kind, books, wearing apparel, plate, money, jewels, medals, patterns, models, scientific cabinets and collections, paintings, sculpture and curiosities are not included in said insured property unless specially mentioned."

[239] The articles enumerated differ in different standard forms.

[240] Portsmouth Ins. Co. v. Reynolds, 32 Gratt. (Va.) 613 (1880).

admitted of being managed and applied by the hands of one man were covered.[241] Furniture and movables are not "fixtures,"[242] but it may be shown that there is a well-settled custom by which the words "store fixtures" in a policy are understood to include tools, furniture and all movable articles in shops which are necessary and used in the ordinary course of trade.[243] The words "store fixtures" in a policy insuring buildings and additions occupied as stores and shoe factory should be given their popular meaning of fixed furniture peculiarly adapted to a room or store. They were thus held not to refer to the fixtures of a factory, and not to include partitions, doors, windows, boiler fixtures, elevator, machinery, steam heating apparatus, gas-piping and speaking tubes.[244] Where the exception was of "fences and other yard fixtures, sidewalks and store furniture and fixtures," it was held that the shelving in a house and office inclosed in a railing in one corner of the interior were store fixtures within the meaning of the exception.[245] Furniture stored in a hotel to be used in the business of a hotel is not within this exception.[246]

The word "storage" means safe custody, and as here used applies only to the storing of merchandise for trade purposes, and when storing is the principal object of the deposit.[247] Thus, it does not apply to goods kept merely for sale, raw material kept on hand for the purpose of being manufactured,[248] or to goods temporarily left in a storeroom.[249] Silver forks and tea and table spoons are not "plate," and are not excluded by a clause excluding "plate" and other articles.[250]

[241] Lovewell v. Westchester F. Ins. Co., 124 Mass. 418, 26 Am. Rep. 671 (1878).

[242] Holmes v. Charlestown, etc., Ins. Co., 10 Metc. (Mass.) 211 (1845).

[243] Whitmarsh v. Conway F. Ins. Co., 16 Gray (Mass.) 359 (1860).

[244] Thurston v. Union Ins. Co., 17 Fed. 127 (1883).

[245] Commercial F. Ins. Co. v. Allen, 80 Ala. 571 (1886).

[246] Continental Ins. Co. v. Pruitt, 65 Tex. 125 (1885); Home Ins. Co. v. Gwathmey, 82 Va. 923, 1 S. E. 209 (1887). As to plate and paintings, see Moadinger v. Mechanics' F. Ins. Co., 2 Hall (N. Y.) 490 (1829).

[247] New York, etc., Ins. Co. v. Langdon, 6 Wend. (N. Y.) 623 (1831).

[248] Vogel v. People's, etc., Ins. Co., 9 Gray (Mass.) 23 (1857).

[249] Hynds v. Schenectady, etc., Ins. Co., 11 N. Y. 554 (1854).

[250] Hanover F. Ins. Co. v. Mannasson, 29 Mich. 316 (1874).

§ 237. Plate glass, frescoes and decorations.—These articles are not excepted from the contract of insurance, as this clause merely provides that in case of loss the amount of recovery shall not be any greater proportion of their value than the policy bears to the whole insurance on the building described.[251]

[251] Moadinger v. Mechanics' F. Ins. Co., 2 Hall (N. Y.) 490 (1829).

CHAPTER XI.

PROVISIONS OF THE STANDARD POLICY, CONTINUED.

VII. Provisions Relating to Interest in and Care of Property.

This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy; or if the subject of insurance be a manufacturing establishment, and it be operated in whole or in part at night later than ten o'clock, or if it cease to be operated for more than ten consecutive days; or if the hazard be increased by any means within the control or knowledge of the insured; or if mechanics be employed in building, altering or repairing the within described premises for more than fifteen days at any one time; or if the interest of the insured be other than unconditional and sole ownership; or if the subject of insurance be a building on ground not owned by the insured in fee-simple; or if the subject of insurance be personal property and be or become incumbered by a chattel mortgage; or if, with the knowledge of the insured, foreclosure proceedings be commenced or notice given of sale of any property covered by this policy by virtue of any mortgage or trust deed; * * * *or if illuminating gas or vapor be generated in the described building (or adjacent thereto) for use therein.*

§ 245. **Other insurance.**—The entire policy shall be void if the insured at the time of the execution of the policy has, or shall thereafter make or procure, any other contract of insurance, *whether valid or not,* on the property covered in whole or in part by the policy.[1]

[1] This clause is found in the standard policies of New York, New Jersey, Connecticut, Rhode Island, Wisconsin, Louisiana, Iowa, North Dakota, South Dakota, Michigan, and North Carolina. The following provision is found in the standard policies of Massachusetts, Minnesota and Maine: "The policy shall be void if the assured now has or shall hereafter make any other insurance on the said property without the assent of the company." The New Hampshire policy provides that: "The policy shall be void if the insured at the time of any loss has any other insurance on said property, without the assent in writing or in print of the company."

A provision rendering the policy void if the insured has, or shall make or procure other insurance, is reasonable and valid,[2] and has for its object the prevention of an increase of the moral hazard without knowledge of the company.[3] "Those insurance policies which provide for the nullity of the contract in the event of other insurance being effected upon the same property, without the assent of the company, have never been held to be absolutely null when the contract was all regular upon its face but merely voidable at the option of the insurer. The object of such clauses in an insurance policy is to prevent other insurance and the consequent temptation to burn or lessen protection against fire."[4] The provision in the policy is effective, although not referred to by the parties before the policy is issued. A party accepting a policy is bound by its terms, conditions and limitations, and in the absence of fraud or mistake is conclusively presumed to know its contents. In a recent case, which arose under the standard form of policy, the court said:[5] "The clause of the policy quoted declares, in effect, that the entire policy shall be void in case the assured had or should procure any other insurance on the property covered by the policy, or incumbered the same by a chattel mortgage, 'unless otherwise provided by agreement indorsed thereon or

[2] Commercial Union Assur. Co. v. Norwood, 57 Kan. 610, 47 Pac. 529 (1897) [citing Allen v. German, etc., Ins. Co., 123 N. Y. 6, 25 N. E. 309 (1890); Union Nat'l Bank v. German Ins. Co., 18 C. C. A. 203, 71 Fed. 473 (1896); Funke v. Minnesota, etc., Ins. Ass'n, 29 Minn. 347, 13 N. W. 164 (1882); Bard v. Penn, etc., Ins. Co., 153 Pa. St. 257, 25 Atl. 1124 (1893)]; Barnard v. National F. Ins. Co., 27 Mo. App. 26 (1887); Northern Assur. Co. v. Grand View Bldg. Ass'n (U. S.), 22 Sup. Ct. 133 (1902). In Georgia Home Ins. Co. v. Rosenfield, 95 Fed. 358 (1899), it was held that the fact that a short term policy taken in violation of this provision expires before the loss, will not reinstate the policy.

[3] O'Leary v. Merchants', etc., Ins. Co., 100 Iowa 173, 66 N. W. 175, 69 N. W. 420 (1895); Queen Ins. Co. v. Young, 86 Ala. 424, 11 Am. St. 51 (1888). Concealment of the existence of other insurance in no way tends to show fraud: German, etc., Ins. Co. v. Paul (Ind. Ter.), 53 S. W. 442 (1899).

[4] Saville v. Ætna Ins. Co., 8 Mont. 419, 20 Pac. 646 (1889).

[5] Wilcox v. Continental Ins. Co., 85 Wis. 193, 55 N. W. 188 (1893); O'Brien v. Home Ins. Co., 79 Wis. 399, 48 N. W. 714 (1891); Bosworth v. Merchants' F. Ins. Co., 80 Wis. 393, 49 N. W. 750 (1891). Where a policy is issued upon property on which there is already $3,000 insurance and contains the words "total concurrent insurance $4,000," the insured may take $1,000 additional insurance without the consent of the company: East Texas F. Ins. Co. v. Blum, 76 Tex. 653, 13 S. W. 572 (1890).

added thereto.' There is no pretense of any agreement indorsed thereon, or otherwise, and such prior insurance and chattel mortgage are admitted in the complaint. Such being the facts, it follows from the authorities cited that the policy was void in its inception unless the condition was waived by the company."

A provision requiring the insured to give notice of "any other insurance effected" refers to prior as well as subsequent insurance.[6]

§ 246. Definition — Different interests. — The words "other," "double" and "overinsurance" are used indiscriminately to describe the obtaining of two or more policies upon the same interest, against the same risk and for the benefit of the same person.[7] Although it must be upon the same interest it need not be in the same name.[8] The provision is not violated by the existence of a prior policy in which the insured has no interest and from which he can receive no benefit.[9] An insurance by a partner of his undivided interest is not a breach of the condition.[10] It follows that different interests may be insured;[11] such as that of the owner of the land and a person holding under a contract for a deed,[12] or a mortgagor and mortgagee.[13] But where the policy is in the name of the mortgagor, and is made payable to the mortgagee as his interest may appear, a subsequent policy obtained by the mortgagor is within the provision.[14] A mortgagee to

[6] Warwick v. Monmouth, etc., F. Ins. Co., 44 N. J. L. 83, 43 Am. Rep. 343 (1882).

[7] California Ins. Co. v. Union, etc., Co., 133 U. S. 387 (1890); Lebanon, etc., Ins. Co. v. Kepler, 106 Pa. St. 28 (1884); Ætna F. Ins. Co. v. Tyler, 16 Wend. (N. Y.) 385, 30 Am. Dec. 90 (1836); Clarke v. Western Assur. Co., 146 Pa. St. 561, 28 Am. St. 821 (1891).

[8] Perkins v. New England, etc., Ins. Co., 12 Mass. 214 (1815); Godin v. London Assur. Co., 1 Burr. 489 (1758); DeWitt v. Agricultural Ins. Co., 157 N. Y. 353, 51 N. E. 977 (1898).

[9] Copeland v. Phœnix Ins. Co., 96 Ala. 615, 38 Am. St. 134 (1892).

[10] Hall v. Concordia F. Ins. Co., 90 Mich. 403, 51 N. W. 524 (1892).

[11] Nussbaum v. Northern Ins. Co., 37 Fed. 524 (1889); Mitchell v. Home Ins. Co., 32 Iowa 421 (1871); Herkimer v. Rice, 27 N. Y. 173 (1863); Home Ins. Co. v. Balt. Warehouse Co., 93 U. S. 527 (1876); City, etc., Bank v. Pennsylvania F. Ins. Co., 122 Mass. 165 (1876).

[12] Ætna F. Ins. Co. v. Tyler, 16 Wend. (N. Y.) 385 (1836).

[13] Wheeler v. Watertown F. Ins. Co., 131 Mass. 1 (1881); Guest v. New Hampshire F. Ins. Co., 66 Mich. 98, 33 N. W. 31 (1887); Woodbury v. Charter Oak, etc., Ins. Co., 31 Conn. 517 (1863).

[14] Gillett v. Liverpool, etc., Ins. Co., 73 Wis. 203, 9 Am. St. 784 (1888); Sias v. Roger Williams Ins. Co., 8 Fed. 187 (1880).

whom loss in a policy is made payable, and who accepts and retains a policy which shows on its face that the mortgagor is insured, can not say that he is not affected by the imputed knowledge of the mortgagor as to the issuance of the policy, for the purpose of avoiding the effect of other insurance procured by the latter.[15] But invalid insurance taken by the owner of the property in violation of this provision can not be considered in determining the right of the mortgagee when the policy provides that his interest shall not be invalidated by any act of the owner.[16] Contemporaneous insurance is within this provision.[17] So, a provision is broken by a prior policy existing in the name of the joint owner of the property.[18]

The insured is not affected by a subsequent policy procured by a stranger without his knowledge and consent,[19] although he may become bound by ratifying such acts or accepting benefits under the insurance. Thus, previous insurance taken out by an unauthorized agent, and of which the insured had no knowledge until after the loss, does not avoid the policy.[20] But where, without the knowledge of the insured, his wife procured additional insurance upon the property covered by the policy, and after the loss he received the benefits of the additional insurance, it was held that by thus accepting the benefits of the unauthorized act he ratified the same.[21]

§ 247. **Whether valid or invalid.**—These words were added for the purpose of avoiding controversy as to the effect of subsequent insurance under a policy which contains a provision which renders it void or voidable by the existence of a prior policy. It has been generally sustained, although some courts have attempted to construe it

[15] Holbrook v. Baloise F. Ins. Co., 117 Cal. 561, 49 Pac. 555 (1897).

[16] Eddy v. London Assur. Corp., 143 N. Y. 311, 25 L. R. A. 686 (1894).

[17] United Firemen's Ins. Co. v. Thomas, 92 Fed. 127, 34 C. C. A. 240 (1899).

[18] Horridge v. Dwelling House Ins. Co., 75 Iowa 374, 39 N. W. 648 (1888). In Pitney v. Glens Falls Ins. Co., 65 N. Y. 6 (1875), it was held that where property owned in common was insured, a subsequent policy effected by one of the owners without mentioning the joint ownership was other insurance.

[19] Carpenter v. Providence Ins. Co., 16 Pet. (U. S.) 495 (1842). See Phœnix Ins. Co. v. Michigan, etc., R. Co., 28 Ohio St. 69 (1875).

[20] Cowart v. Capital City Ins. Co., 114 Ala. 356, 22 So. 574 (1896); McKelvy v. German, etc., Ins. Co., 161 Pa. St. 279, 28 Atl. 1115 (1893); Hughes v. Insurance Co., 40 Neb. 626, 59 N. W. 112 (1894).

[21] German Ins. Co. v. Emporia, etc., Ass'n, 9 Kan. App. 803, 59 Pac. 1092 (1900).

away.[22] Thus, in New Hampshire, it was held that as a subsequent void policy is a mere nullity it can have no effect upon existing rights.[23] So, in Indiana, it was held that there was a breach only when it was necessary to offer extrinsic evidence to show that the subsequent policy was invalid.[24] Where the same conditions are contained in a policy, it is held in Michigan[25] that the subsequent policy is void, and in North Carolina[26] that it affects the prior policy. In Massachusetts it was recently held that in an action on a policy containing a condition against other insurance, the fact that the other policies were issued by other companies either before or after the one in suit, without the consent of the company, or that suit is pending thereon, is no defense where such policies contain the same provisions. Each policy contained a rider, similar to that on the policy on which the action was brought, which contained the words: "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the insured now has, or shall hereafter make or procure, any other contract of insurance, whether valid or not, ón the property, in whole or in part, covered by this policy."[27] "It is clear," said the court, "that under our decisions neither of these policies affords any defense to the action. If the policy of the Citizens' Company was issued before the policy in suit it became void by its terms when the defendant issued its policy. If it was issued subsequently, as was the policy of the Security Company, for the same reason neither it nor the policy of the latter company took effect." Where the prior policy had become void by breach of condition before the issuance of the policy in question, which contained the "valid or invalid" clause, it was held that there was no breach of condition.[28]

§ **248. Where the words "valid or invalid" do not appear.**—There has been much controversy over the effect of subsequent insurance which, by its terms, is rendered void or voidable by the existence of

[22] Phœnix Ins. Co. v. Copeland, 90 Ala. 386 (1890); Sugg v. Hartford F. Ins. Co., 98 N. C. 143, 3 S. E. 732 (1887); Bigler v. New York Ins. Co., 22 N. Y. 402 (1860).

[23] Gee v. Cheshire, etc., Ins. Co., 55 N. H. 65, 20 Am. Rep. 171 (1874).

[24] Phenix Ins. Co. v. Lamar, 106 Ind. 513, 55 Am. Rep. 764 (1886).

[25] Keyser v. Hartford F. Ins. Co., 66 Mich. 664, 33 N. W. 756 (1887).

[26] Sugg v. Hartford F. Ins. Co., 98 N. C. 143, 3 S. E. 732 (1887).

[27] Hayes v. Milford, etc., Ins. Co., 170 Mass. 492, 49 N. E. 754 (1898), citing earlier cases.

[28] Stevens v. Citizens' Ins. Co., 69 Iowa 658 (1886).

prior insurance. The importance of cases discussing this question has been considerably decreased by the adoption of the standard form. In a recent case in Maryland it was said:[29] "Does the fact that a subsequent policy was procured without the consent of the first underwriter avoid the first policy under the above quoted conditions contained therein against other insurance, when the second policy explicitly declares that the company which issued it shall not be liable for loss if there is other prior insurance, whether valid or not, held on the same property without the written consent of the second insurer? The doctrine laid down by the highest tribunals of Massachusetts, Pennsylvania and other states is that the subsequent insurance, being invalid at the time of the loss by reason of the breach of the condition therein, the prior insurance is good, and the first underwriter is liable on the policy issued by it.[30] On the other hand, it has been held elsewhere that the subsequent policy, whether legally enforceable or not, or whether voidable on its face or voidable for extrinsic matter, works a forfeiture of the prior policy.[31]

[29] Sweeting v. Mutual F. Ins. Co., 83 Md. 63, 32 L. R. A. 570 (1896).

[30] Thomas v. Builders', etc., Ins. Co., 119 Mass. 121, 20 Am. Rep. 317 (1875); Allison v. Phœnix Ins. Co., 3 Dill. (U. S.) 480 (1873); Fireman's Ins. Co. v. Holt, 35 Ohio St. 189 (1878); Knight v. Eureka, etc., Ins. Co., 26 Ohio St. 664, 20 Am. Rep. 778 (1875); Stacey v. Franklin F. Ins. Co., 2 Watts & S. (Pa.) 506 (1841); Jackson v. Massachusetts Mut. F. Ins. Co., 23 Pick. (Mass.) 418, 34 Am. Dec. 69 (1839); Clark v. New England Mut. F. Ins. Co., 6 Cush. (Mass.) 342, 53 Am. Dec. 44 (1850); Hardy v. Union, etc., Ins. Co., 4 Allen (Mass.) 217 (1862); Philbrook v. New England, etc., Ins. Co., 37 Me. 137 (1853); Lindley v. Union Farmers', etc., Ins. Co., 65 Me. 368, 20 Am. Rep. 701 (1876); Gale v. Belknap County Ins. Co., 41 N. H. 170 (1860); Gee v. Cheshire, etc., Ins. Co., 55 N. H. 65 (1874); Jersey City Ins. Co. v. Nichol, 35 N. J. Eq. 291, 40 Am. Rep. 625 (1882); Schenck v. Mercer, etc., Ins. Co., 24 N. J. L. 447 (1854); Rising Sun Ins. Co. v. Slaughter, 20 Ind. 520 (1863). In St. Paul, etc., Ins. Co. v. Knickerbocker, etc., Co., 93 Fed. 931, 36 C. C. A. 19 (1899), it was held that a provision making the policy void upon taking other insurance, so that the entire amount on the policy shall exceed a certain sum, is not violated by additional insurance to be valid only in case of deficiency of the prior policies below the amount so named, although the combined face value of the policies exceeds the amount so limited.

[31] Carpenter v. Providence, etc., Ins. Co., 16 Pet. (U. S.) 495, 10 L. ed. 1044 (1842); Allen v. Merchants', etc., Ins. Co., 30 La. Ann. 1386, 31 Am. Rep. 243 (1878); Somerfield v. State Ins. Co., 8 Lea (Tenn.) 547 (1881); Funke v. Minnesota, etc., Ins. Ass'n, 29 Minn. 347, 43 Am. Rep. 216 (1882); Lackey v. Georgia Home Ins. Co., 42 Ga. 456 (1871); Bigler v. New York, etc., Ins. Co., 22 N. Y.

There is still an intermediate view taken by the Supreme Court of Iowa[32] to the effect that the question of the validity of the prior insurance turns upon whether the subsequent policy has in fact been avoided. If the second policy is recognized by the insurer issuing it to be a valid policy, any breach of conditions being waived, this makes it valid insurance and avoids the first policy; but if the subsequent policy has been rescinded for condition broken, there is no other insurance so as to invalidate the prior policy. The obvious and insuperable objeetion to this latter view lies in the fact that it makes the validity of the contract between the parties under the first policy depend not upon their own agreement nor the effect of that agreement, nor upon their own acts, or acts of either of them, but upon what another person, the second underwriter, a stranger to the first contract, may voluntarily do with respect to affirming or repudiating a totally different and distinct contract of insurance, without the slightest reference to any judicial inquiry as to the validity or invalidity of the second policy or its resultant legal effect upon the first." The court further said: "Giving to the words of the contract of insurance set forth in the first policy their obvious meaning, and bearing in mind that they do not, as do those used in the second policy, relate to or specifically designate invalid insurance, the only tenable conclusion is, that the intention of both the contracting parties was to strike down the first policy only on condition that the second was valid and binding. And this is the conclusion reached by the best considered cases. If the 'other insurance' does not mean such a contract as is legally binding and enforceable, then no certain tests can be applied, and we abandon all legal guides. As stated in Missouri, 'the sound conclusion would seem to be that in a case like this the other insurance must be legal insurance, and that the true issue is whether the policy, not on its face, but on all the facts legally in evidence, is binding upon the insurer.'" So, in a recent case in Illinois,[33] it was held that there can be no existing insurance upon property within the meaning of this clause unless such insurance is valid and in full force and capable of being legally enforced in case of loss. Hence, if one takes a policy of insurance containing a provision that

402 (1860); Stevenson v. Phœnix Ins. Co., 83 Ky. 7 (1884).

[32] Hubbard v. Hartford F. Ins. Co., 33 Iowa 325 (1871); Behrens v. Germania F. Ins. Co., 64 Iowa 19 (1884).

[33] Germania F. Ins. Co. v. Klewer, 129 Ill. 599 (1899).

it shall be void in case of other insurance on the same property without the consent of the company indorsed on the policy, and at the same time the insured has another policy on the property not consented to by indorsement on the latter policy, this will render the last policy inoperative so long as the prior policy is in force, but the latter will attach and become operative on the expiration of the prior policy.

§ 249. **Consent of the company—Waiver.**—By the terms of this policy the consent of the company to other insurance must be obtained and indorsed upon the policy, hence a mere oral permission to the insured by the local agent who issued the policy to take out additional insurance is not binding upon the company and does not prevent a forfeiture where the policy contains a provision that no agent shall have power to waive any provisions or conditions except by writing attached to the policy.[34] This provision is effective against the act of the secretary and general agent of the company where there is no proof that he had authority to act for the company.[35] But it is always a mere question of authority.[36] In one case, where additional insurance was obtained with the knowledge and consent of the agent who issued the policy, it was left to the jury to determine whether the consent of the company had been given.[37] Evidence that notice of additional insurance was mailed to the company, where its receipt is denied, is not sufficient to show compliance with a provision requiring that notice of all additional insurance shall be given to the company.[38] A provision forbidding additional insurance is for the benefit of the company and may be waived by it.[39]

[34] Northern Assur. Co. v. Grand View Bldg. Ass'n (U. S.), 22 Sup. Ct. 133 (1902), reversing 41 C. C. A. 207; Lippman v. Ætna Ins. Co., 108 Ga. 391, 33 S. E. 897 (1899); Hutchinson v. Western Ins. Co., 21 Mo. 97, 64 Am. Dec. 218 (1855); Carpenter v. Providence, etc., Ins. Co., 16 Pet. (U. S.) 495 (1842). Where the policy does not require the notice to be in writing, although it requires the consent of the company to be in writing, the notice may be by parol: Kenton Ins. Co. v. Shea, 6 Bush (Ky.) 174, 99 Am. Dec. 676 (1869).

[35] O'Leary v. Merchants', etc., Ins. Co., 100 Iowa 173, 62 Am. St. 555 (1896).

[36] See Hartford F. Ins. Co. v. Small, 66 Fed. 490 (1895); Cleaver v. Traders' Ins. Co., 71 Mich. 414, 15 Am. St. 275 (1888).

[37] Grubbs v. Virginia, etc., Ins. Co., 110 N. C. 108, 14 S. E. 516 (1892).

[38] Fairfield Packing Co. v. Southern Mut. Ins. Co., 193 Pa. St. 184, 44 Atl. 317 (1899).

[39] Bigelow v. Granite, etc., Ins. Co., 94 Me. 39, 46 Atl. 808 (1900); Kahn v. Traders' Ins. Co., 4 Wyo. 419, 62 Am. St. 47 (1893).

The company is charged with knowledge of facts known to its agent at the time the policy is issued, and if the agent then knew of existing insurance the company is estopped thereafter to claim a forfeiture for breach of condition against other insurance.[40]

It has been held that the company is under an obligation to take some affirmative action after it learns of the violation of this condition against additional insurance, and that if it fails to do so within a reasonable time after notice it waives the stipulation.[41] But in a case where the policy also contained a clause authorizing the company to terminate at any time at its option by giving notice and refunding a ratable proportion of the premium, and there was evidence tending to show that notice of additional insurance was communicated to the company's agent at the time of or before the fire, the court said:[42] "The provision in the policy authorizing the company to terminate the contract at any time, at its option, bore no special relation to that concerning other insurance. By the plain terms of the policy, other insurance without the consent of this company would *ipso facto* avoid the contract; and in case of a contract thus avoided, it would not be obligatory on the insurer to repay any of the unearned premium; nor would he be required to give notice that he would insist upon and avail himself of the proper legal effect of the agreement. It required no affirmative act of election on the part of the company to make operative the clause avoiding the contract whenever the specified conditions should occur. * * * The fault in the charge is in the proposition that the failure to cancel the policy by the affirmative action on the part of the company after it had notice of additional insurance, would of itself be effectual as an election to continue the policy in force."

§ 250. **Policy covering a part of the property.**—By the weight of authority, where the contract is entire, subsequent insurance upon a

[40] Northern Assur. Co. v. Grand View Bldg. Ass'n, 101 Fed. 77, 41 C. C. A. 207 (1900) [but this case was reversed in 22 Sup. Ct. 133 (1902)]; Hackett v. Philadelphia Underwriters, 79 Mo. App. 16 (1899); Swain v. Macon F. Ins. Co., 102 Ga. 96, 29 S. E. 147 (1896); McBryde v. South Carolina, etc., Ins. Co., 55 S. C. 589, 74 Am. St. 769 (1899); Strauss v. Phenix Ins. Co., 9 Colo. App. 386, 48 Pac. 822 (1897); Quigley v. St. Paul, etc., Trust Co., 60 Minn. 275, 62 N. W. 287 (1895).

[41] Alabama, etc., Assur. Co. v. Long, etc., Co., 123 Ala. 667, 26 So. 655 (1899).

[42] Johnson v. American Ins. Co., 41 Minn. 396, 43 N. W. 59 (1889). See also, Robinson v. Fire Ass'n, 63 Mich. 90, 29 N. W. 521 (1886).

part of the property will defeat the entire policy. Thus, where a part of the insurance was apportioned to the building and a part to household goods and furniture therein, the taking of subsequent insurance upon the building alone was held to avoid the entire policy. "In order, therefore, to give effect to the condition, according to the intent and purpose of the contract," said the court, "it follows necessarily that where the property covered by one policy, although consisting of separate items, appears to be so situate as to constitute substantially one risk, then, even though separate amounts of the insurance be apportioned to each separate item or class of property, if the consideration for the contract and the risk are both indivisible, the contract must be treated as entire, nevertheless. To such a policy, the principles governing entire and indivisible contracts are applicable, for the reason that the matter which renders the policy void as to a part affects the risk of the insurer in respect to other items in the same manner as it affects those items in respect to which the contract is avoided. In such cases the only effect of the apportioning of the amount of the insurance upon separate items is to limit the extent of the company's liability to some specified sum upon each item or class of property insured."[43]

But in Pennsylvania it was held that where one policy covers a building and a subsequent policy in another company covers the building, machinery, shafting, etc., it is not a case of double insurance and not within the meaning of the clause.[44] So, where the first policy covered "electric lamps, shades, wires and all other electric fixtures and appurtenances," and a subsequent policy covered household goods and "fixtures of every description," there was no apportionment of the risk between the different kinds of property insured, and it was held that there was not a case of double insurance.[45] In Iowa, under a policy which contained the words, "other concurrent insurance permitted," in the absence of any limitations in amount, it was held that the latter policy need not exactly concur in covering all of the period of the time of insurance.[46]

[43] Havens v. Home Ins. Co., 111 Ind. 90, 12 N. E. 137 (1887). See Pitney v. Glens Falls Ins. Co., 65 N. Y. 6 (1875); Liscom v. Boston, etc., Ins. Co., 9 Met. (Mass.) 205 (1845); Quarrier v. Peabody Ins. Co., 10 W. Va. 507 (1877); Illinois, etc., Ins. Co. v. Fix, 53 Ill. 151, 5 Am. Rep. 38 (1820); Phœnix Ins. Co. v. Michigan, etc., R. Co., 28 Ohio St. 69 (1875).

[44] Sloat v. Royal Ins. Co., 49 Pa. St. 14, 88 Am. Dec. 477 (1865).

[45] Clarke v. Western Assur. Co., 146 Pa. St. 561, 28 Am. St. 821 (1892). See Joyce Ins., §§ 2472, 2473.

[46] Washburn-Halligan, etc., Co. v.

§ 251. Operation of manufacturing establishment.—If the subject of the insurance is a manufacturing establishment, and it is operated in whole or in part at night later than ten o'clock, or if it ceases to be operated for more than ten consecutive days without the consent of the company indorsed on the policy, the entire contract is rendered invalid.[47] A breach of this condition renders the policy immediately void,[48] and the fact that a watchman is employed on the premises during the time so that there is no increase of risk, is immaterial.[49] Where the insured goods are exclusively personal property, such as machinery and merchandise, and the policy provides that if the property "is a manufacturing establishment" the non-operation of the establishment will avoid the policy, such non-operation will not avoid

Merchants', etc., Ins. Co., 110 Iowa 423, 81 N. W. 707 (1900). In this case the court said: "The authorities determining when the insurance is double throw little light on the question. Besides, these are in conflict, the supreme court of Pennsylvania holding that policies in order to constitute double insurance must cover identically the same property: Clarke v. Western Assur. Co., 146 Pa. St. 561, 23 Atl. 248, 15 L. R. A. 127 (1892); while that of New York, in overruling an earlier case, has adjudged it double insurance if one policy includes only part of the property covered by the other: Ogden v. East River Ins. Co., 50 N. Y. 388, 10 Am. Rep. 492 (1872)."

[47] This provision is found in the standard policies of New York, New Jersey, Connecticut, Rhode Island, Wisconsin, Louisiana, Iowa, North Dakota, South Dakota, Michigan and North Carolina. The policies of Massachusetts, Minnesota and Maine provide that: "This policy shall be void if the subject of the insurance be a manufacturing establishment, running in whole or in part extra time, except that such establishments may run in whole or in part extra hours, not later than nine o'clock P. M., or if such establishments shall cease operations for more than thirty days without permission in writing indorsed hereon." The New Hampshire policy provides that: "This policy shall be void during the existence and continuance of things stipulated against as follows: * * * if the subject of the insurance be a manufacturing establishment in which the works or machinery are operated more than the customary or legal hours, or all night, without the written or printed assent of this company thereto, except that permission is hereby given to operate machinery extra hours, not later than 10 o'clock P. M., for the purpose of equalizing work, a competent man other than the regular watchman being kept in charge of those rooms in which shafting and belts are running, but where the machinery is not at work; or if such establishment shall cease operation for more than thirty days without permission in writing indorsed thereon."

[48] Cronin v. Fire Ass'n, 123 Mich. 277, 82 N. W. 45 (1900).

[49] Dover Glass Works Co. v. American F. Ins. Co., 1 Marvel (Del.) 32, 29 Atl. 1039, 65 Am. St. 264 (1895).

the policy on the machinery.[50] A description of the insured property as a distillery is not a representation that it is being operated as such.[51] This provision is not broken by a temporary suspension of business, as the contract must be construed in the light of the customary methods of conducting a manufacturing establishment.[52] Thus, a policy upon a sawmill run by water is not invalidated by delays and interruptions incident to the business caused by low water, diminished custom, or derangement of machinery.[53] In one case the court defined the meaning of the words, "ceased to be operated," as follows:[54] "The operation of a large manufacturing establishment means doing everything necessary to its successful and profitable management. It would necessarily be the work of many hands, and the operation would be multiplied many fold. The duties of the many employes would be quite dissimilar and entirely independent of each other, but all necessary to either the profitable or successful operation of the factory. * * * The ceasing to perform any one thing for the time being of the many required to be done would certainly not be to cease to operate the factory. Any one might be temporarily suspended and yet the factory be said to be in successful operation. * * * The operating of an extensive factory does not mean that it shall be kept employed in all its various departments every day—that is, all the time. * * * It may properly be closed down over Sundays and all legal holidays, or for any cause that a prudent manager of such an establishment would deem prudent and best for the interests of the owners. On the same principle, one department may be kept in operation and others cease temporarily. It might be the fabrics manufactured might be in excess of the sales or demands of the trade, and for that reason a prudent superintendent might deem it best to stop the spindles and the looms for a season; or the sales might be in excess of the supplies, and for that reason no goods would be contracted for a time. Would any one say that such a partial stoppage would be a violation

[50] Phenix Ins. Co. v. Holcombe, 57 Neb. 622, 73 Am. St. 532 (1899); Halpin v. Ætna F. Ins. Co., 120 N. Y. 73, 23 N. E. 989, 8 L. R. A. 79 (1890).

[51] Louck v. Orient Ins. Co., 176 Pa. St. 638, 33 L. R. A. 712 (1896).

[52] Lebanon, etc., Ins. Co. v. Leathers (Pa.), 8 Atl. 424 (1887).

[53] Whitney v. Black River Ins. Co., 72 N. Y. 117 (1878); Rosecrans v. North Amer. Ins. Co., 66 Mo. App. 352 (1896); Glendale Woolen Co. v. Protection Ins. Co., 21 Conn. 19 (1850); Luce v. Dorchester, etc., Ins. Co., 105 Mass. 297 (1870).

[54] American F. Ins. Co. v. Brighton Cotton Mfg. Co., 125 Ill. 131, 17 N. E. 771 (1888).

of the contract of insurance contained in the policy in suit? So narrow a construction would make the contract of no value to the assured, and to observe it would render the usual and ordinary management of such establishments impracticable." It was further held that the temporary suspension of a large portion of the works was permissible within the terms of the contract.

Within this rule the temporary cessation of the operation of the machinery of a sawmill during the illness of the sawyer, the other business going on as usual, does not violate the condition.[55] So, the closing of a mill for forty-two days without notice to the insurers, occasioned by the want of logs, which are daily expected but detained by low water, will not avoid a policy conditioned to become void "if the mill should cease to be operated without notice to or consent of the company."[56] The court said: "It must mean a closing with the intention of ceasing operation, not the shutting down for a few days or weeks because of the happening of an event incident to the conducting of the mill in that locality, which could reasonably be expected." Where the insurance was upon a tannery it appeared that for some time prior to the fire the insured had not done any tanning in the shops connected with the property because of want of material. He was negotiating with parties for hides and stocks, and had given orders, but they had not been filled when the fire occurred. But during all the time the property was occupied and used as a tannery; bark was purchased, prepared and placed in the sheds, liquors were kept in the vats ready for use, and the machinery and tools all remained on the premises. It was held that the mere temporary suspension of the business for the purpose of repairing and for the want of a supply of material was not "ceasing to operate the establishment" within the meaning of the policy.[57] But a sawmill which has stopped running for the winter is "shut down," although men are employed in and about the premises in shipping lumber.[58] Where the policy contained a condition that "should any mill insured by this company be shut down or remain idle *from any cause whatever* more than twenty days continuously," it should be

[55] Ladd v. Ætna Ins. Co., 147 N. Y. 478, 42 N. E. 197 (1895).

[56] City Planing, etc., Co. v. Merchants', etc., Ins. Co., 72 Mich. 654, 16 Am. St. 552 and note (1888). See, also, note to Moore v. Phœnix Ins. Co., 10 Am. St. 390, 396 (1886).

[57] Lebanon Mut. Ins. Co. v. Leathers (Pa.), 8 Atl. 424, Woodruff Ins. Cas. 172 (1887); American F. Ins. Co. v. Brighton, etc., Mfg. Co., 125 Ill. 131 (1888).

[58] McKenzie v. Scottish, etc., Ins., 112 Cal. 548, 44 Pac. 922 (1896).

void, it was held that shutting down for the purpose of making necessary repairs suspended the policy, as this language included and covered any and every cause that might have the effect to stop the operation of the mill.[59] So, under the Massachusetts policy, which provides for forfeiture if the establishment ceases operation for more than thirty days, it was held that the stoppage of the machinery for four months and the discharge of the employes forfeited the policy on the building and machinery, although the company knew that it was usual thus to stop business in the dull season.[60]

A manufacturing establishment has not ceased to be operated within the meaning of this provision where, after the operation of the machinery ceased, and while the premises were occupied by a foreman who was engaged in putting together and selling engines and other articles belonging to the estate, the policy was renewed at the request of the assignees for the benefit of the insured's creditors.[61]

§ 252. **Running over hours.**—The provision which prohibits the operation of the establishment after ten o'clock at night without the consent of the company is valid and binding, but may be waived by the insurance company. Thus, an agent of a fire insurance company agreed to insure a factory, and after having knowledge that it was operated at night after ten o'clock, as well as in the day, delivered the policy containing this condition, and also a provision that no agent of the company should have power to waive any of the provisions except by means of a written agreement indorsed on the policy. It was held that by issuing the policy with this knowledge the provision was waived.[62] Where the prohibition is merely against running extra hours the policy is not rendered void because the mill is sometimes run at night.[63] A permit to operate the establishment over hours for a certain designated time expires by the expiration of the time, and it is not necessary that the company should do anything for the

[59] Day v. Mill Owners', etc., Ins. Co., 70 Iowa 710, 29 N. W. 443 (1886); Brighton Mfg. Co. v. Reading F. Ins. Co., 33 Fed. 232 (1887).

[60] Stone v. Howard Ins. Co., 153 Mass. 475, 27 N. E. 6, 11 L. R. A. 771 (1891).

[61] Bole v. New Hampshire F. Ins. Co., 159 Pa. St. 53, 28 Atl. 205 (1893).

[62] Improved Match Co. v. Michigan, etc., Ins. Co., 122 Mich. 256, 80 N. W. 1088 (1899).

[63] German, etc., Ins. Co. v. Steiger, 109 Ill. 254 (1884). For the construction of similar provisions, see North Berwick Co. v. New England, etc., Ins. Co., 52 Me. 336 (1864); Bilbrough v. Metropolitan Ins. Co., 5 Duer (N. Y.) 587 (1856).

purpose of reviving the condition. A policy was upon a building described as occupied principally for the making of certain articles, and stated that in consideration of the sum named and "extra premium," permission was given to work nights for four months from date. There was a printed condition to the effect that if the property insured "be a manufacturing establishment running in whole or in part over or extra time, or at night, without special agreement indorsed on this policy," the policy shall be void. The building was destroyed by fire while the factory was being operated in the nighttime after the expiration of the four months from the date of the policy, and it was held that an action could not be maintained.[64]

§ 253. **Increase of risk.**—A policy is rendered void if the hazard be increased by any means within the control or knowledge of the insured.[65] This is merely a recognition of a general principle of insurance which arises out of the nature of the contract.[66] There are

[64] Reardon v. Faneuil Hall Ins. Co., 135 Mass. 121 (1883); Betcher v. Capital F. Ins. Co., 78 Minn. 240 (1899).

[65] This provision is found in the standard policies of New York, New Jersey, Connecticut, Rhode Island, Louisiana, Wisconsin, Michigan, North Dakota, South Dakota, Iowa, and North Carolina. The New Hampshire clause is as follows: "This policy shall be void and inoperative during the existence or continuance of the acts or conditions of things stipulated against as follows: * * * if without such assent, the situation or circumstances affecting the risk, shall, by or with the knowledge, advice, agency or consent of the insured, be so altered as to cause an increase of such risk." The Maine and Massachusetts forms are as follows: "This policy shall be void if without the assent in writing or in print of the company, the situation or circumstances affecting the risk shall, by or with the knowledge, advice, agency or consent of the insured, be so altered as to cause an increase of such risks." The Minnesota form is as follows: "The policy shall be void if without such assent the situation or circumstances affecting the risk shall, by or with the knowledge, advice, agency or consent of the insured, be so altered as to cause an increase of such risks." The Iowa policy provides further that: "It is understood, and the insured by the acceptance of this policy so agrees, that a removal of the property, or any part thereof, without notice to, and the consent of the company endorsed hereon in writing or attached hereto, except in case of fire, or any change of use, or any change in occupancy (except change of tenants without increase of hazard), is in each instance an increase of hazard within the meaning of section 1743, Code of Iowa."

[66] Boatwright v. Ætna Ins. Co., 1 Strob. (S. C.) 281 (1847); Hoffecker v. New Castle, etc., Ins. Co., 5 Houst. (Del.) 101 (1875).

innumerable methods by which the insured may so change the conditions which existed when the contract was made as to impose new and uncontemplated risks upon the insurer. It may be by actual changes in the physical structure or use of the property, or by the introduction of new customs or methods of doing business, or by the discontinuance of certain precautions which were understood by the insurer to be in use, such as the keeping of a watchman.[67] Where the provision is violated the contract is avoided or suspended without reference to the actual cause of the loss.[68] It is only such changes as increase the risk which violate the condition, and the question of increase of hazard is for the determination of the jury.[69] Thus, whether the erection of a grocery store by another party near the property of the insured creates such a substantial increase of the risk as to avoid the policy is for the jury.[70] But the court will take judicial notice of the fact that the storing of fireworks in a building increases the risk.[71]

The provision must be given a reasonable construction. It is not broken by every act which in any degree increases the risk. It refers to an alteration or change of a durable nature, not to a casual change of a temporary character, such as the careless use of kerosene in starting a fire in a stove,[72] or a mere temporary use of a threshing machine for a few hours on the premises where the insured property is located.[73] Starting a fire near the insured building for the purpose of burning some rubbish, which is communicated to the building, is not such an increase of the risk or hazard as will avoid the contract where there was no design to burn the building.[74] So, a clause with reference to storing hazardous goods is intended to prevent a building from being used for the ordinary deposit of such articles, and not for their

[67] Houghton v. Manufacturers', etc., Ins. Co., 8 Met. (Mass.) 114, 41 Am. Dec. 489 (1844); Diehl v. Adams, etc., Ins. Co., 58 Pa. St. 443, 98 Am. Dec. 302 (1868).

[68] Martin v. Capital Ins. Co., 85 Iowa 643, 52 N. W. 534 (1892); Howell v. Baltimore Eq. Soc., 16 Md. 377 (1860).

[69] Pool v. Milwaukee, etc., Ins. Co., 91 Wis. 530, 51 Am. St. 919 (1895).

[70] Jauvrin v. Rockingham, etc., Ins. Co. (N. H.), 46 Atl. 686 (1900).

[71] Betcher v. Capital F. Ins. Co., 78 Minn. 240 (1899).

[72] Angier v. Western Assur. Co., 10 S. D. 82, 66 Am. St. 685 (1897).

[73] Adair v. Southern, etc., Ins. Co., 107 Ga. 297, 73 Am. St. 122, 45 L. R. A. 204, 33 S. E. 78 (1899); Leggett v. Ætna Ins. Co., 10 Rich. L. (S. C.) 202 (1856).

[74] Des Moines Ice Co. v. Niagara F. Ins. Co., 99 Iowa 193, 68 N. W. 600 (1896).

casual introduction for a temporary purpose, such as the making of reasonable repairs.[75]

The question of materiality is ordinarily determined by its effect upon the rate of premium, but this is not conclusive.[76] Thus, it has been held that the mere fact that the rate on property used in the restaurant business is higher than that on the same property when used in the confectionery and ice cream business is not conclusive that a change from the latter to the former business is an increase of the hazard.[77]

There are many cases illustrating the construction of this provision, but from its nature it is impossible to deduce general principles, and each case must be determined upon its own facts. Changes in the form of an existing lien do not, as a matter of law, amount to an increase of hazard. Thus, if the property against which mechanics' liens have been filed is insured, a forfeiture of the liens and the sale of the property under execution does not, in the absence of other evidence, show an increase of the hazard.[78]

The provision is violated by the introduction of an invention which materially increases the risk.[79] Increase of hazard must be presumed from the erection of a wooden building but a few feet distant from the insured premises, but in this case the contract contained a continuing warranty that there was no exposure of the building on that side by any structure or occupancy within one hundred feet, which was considered as an agreement that such non-exposure was material to the risk, and should continue during the life of the policy.[80] The use of a building insured as a dwelling house, for the illegal sale of intoxicating liquors, does not, as a matter of law, increase the risk.[81] It was held in Michigan that the burning off of paint from a building with a gasoline torch, according to the custom of painters, does not,

[75] O'Niel v. Buffalo F. Ins. Co., 3 N. Y. 122 (1849); Mears v. Humboldt Ins. Co., 92 Pa. St. 15, 37 Am. Rep. 647 (1879); Faust v. American F. Ins. Co., 91 Wis. 158, 64 N. W. 883 (1895); Fraim v. National F. Ins. Co., 170 Pa. St. 151 (1895).

[76] See note to Collins v. Merchants', etc., Ins. Co., 58 Am. St. 441 (1895).

[77] Sun Mut. Ins. Co. v. Tufts, 20 Tex. Civ. App. 147, 50 S. W. 180 (1898).

[78] Greenlee v. North British, etc., Ins. Co., 102 Iowa 427, 63 Am. St. 455 (1897).

[79] Washington Mut. Ins. Co. v. Manufacturers', etc., Ins. Co., 5 Ohio St. 450 (1856).

[80] Straker v. Phenix Ins. Co., 101 Wis. 413, 77 N. W. 752 (1898).

[81] Martin v. Capital Ins. Co., 85 Iowa 643, 52 N. W. 534 (1892).

as a matter of law, increase the hazard.[82] But in Massachusetts the same acts were held to be an "alteration in the situation or circumstances affecting the risk," and hence invalidated the policy.[83] Where there are two or more changes, and one increases the risk, it is immaterial that the other diminishes it.[84] A sale by one partner to the other of his interest in the property is not a violation of this provision.[85]

§ 254. **Changes in adjoining property.**—This provision of the policy does not in terms refer to alterations in adjacent buildings. Such premises are not under the control of the insured, but if he has knowledge of material changes, he certainly should inform the insurer of the facts. But the erection of a building on a lot adjoining that on which the insured building is located, which belongs to another party, and is in no manner under the control of the insured, is not within the provision in the policy that it shall be void if the risk is increased in any manner, except by the erection and use of ordinary outbuildings.[86]

A policy which was payable to a mortgagee contained a provision that it should be void, in case of "increase of hazard by the erection of neighboring buildings." By the terms of a mortgage clause in the policy, the mortgagee's interest was not to be invalidated by any act or neglect of the mortgagor. The renewal clause in the policy provided that "in case there shall have been an increase in the hazard, it must be made known to the company by the assured at the time of the renewal; otherwise this policy shall be void." After the contract by its terms expired, a loss occurred, and it was claimed that there had been a renewal. It appeared that during the life of the original policy the insured erected a building near the one insured, which increased the hazard, and that the agent who obtained the alleged renewal for the owner and mortgagee knew of this fact, but failed to disclose it. It was held that the knowledge of the agent was chargeable to his principal, and that his failure to disclose the hazard ren-

[82] Smith v. German Ins. Co., 107 Mich. 270, 65 N. W. 236, 30 L. R. A. 368 (1895).

[83] First Cong. Church v. Holyoke, etc., Ins. Co., 158 Mass. 475, 33 N. E. 572, 35 Am. St. 508 (1893).

[84] Albion Lead Works v. Williamsburg, etc., Ins. Co., 2 Fed. 479 (1880).

[85] Powers v. Guardian, etc., Ins. Co., 136 Mass. 108, 49 Am. Rep. 20 (1883).

[86] German Ins. Co. v. Wright, 6 Kan. App. 611, 49 Pac. 704 (1897).

dered the policy void. The clause in the mortgage protecting the mortgagee against any act or neglect of the mortgagor or owner did not apply, as it was the mortgagee's own act which rendered the policy void.[87]

§ 255. **Effect of increase of hazard.**—In some states it is held that a violation of the condition against an increase of hazard renders the policy void, while others hold that the effect is merely to suspend the contract during the time the risk is increased.[88] Thus, in Illinois it is said to be the settled law that, under a provision that the policy shall be void in case of a change made in the property increasing the hazard, if such changes are made, and the policy has not been declared forfeited, and the changed conditions cease to exist, leaving the risk no more hazardous than before, the policy again becomes in force.[89] A recovery may thus be had for loss subsequently occurring to which the more hazardous use did not contribute. But many courts hold that a violation of this condition renders the policy void. In a Massachusetts case it appeared that the hazard had been increased by the use of the building for the illegal sale of intoxicating liquors with the knowledge and consent of the insured. The court said:[90] "The question is thus presented whether the provision of the policy that it shall be void in case of an increase of the risk means that it shall be void only during the time while the increase of risk may last, and may revive again upon the termination of the increase of the risk. The provision is that the policy shall be void if any one of several circumstances successively enumerated shall be found to exist. Some of these circumstances relate to the time of issuing the policy, and others could not arise till afterwards. They are of different degrees of importance, some of them going to essential matters of the contract and others being comparatively trivial in character.

[87] Cole v. Germania F. Ins. Co., 99 N. Y. 36 (1885); Mechanics' Ins. Co. v. Hodge, 149 Ill. 298, 37 N. E. 51 (1894).

[88] As to effect of breach of conditions, see § 205, *supra*.

[89] Traders' Ins. Co. v. Catlin, 163 Ill. 256, 35 L. R. A. 595 (1895); New England, etc., Ins. Co. v. Wetmore, 32 Ill. 222 (1863).

[90] Kyte v. Commercial Union Assur. Co., 149 Mass. 116, Woodruff Ins. Cas. 142 (1889). See Concordia F. Ins. Co. v. Johnson, 4 Kan. App. 7, 45 Pac. 722 (1896). As to the effect of the temporary use of the premises, see Hinckley v. Germania F. Ins. Co., 140 Mass. 38, 1 N. E. 737, 54 Am. Rep. 445 (1885); Jennings v. Chenango, etc., Ins. Co., 2 Denio (N. Y.) 75 (1846).

The language of the policy is the same with respect to them all, that the policy shall be void. * * * We think an increase of risk entitles the insurer to avoid the policy absolutely. A contract of insurance depends essentially upon the adjustment of the premium to the risk assumed. If the assured by his voluntary act increases the risk, and the fact is not known, the result is that he gets an insurance for which he has not paid. In its effect upon the company it is not much different from misrepresentation of the condition of the property. If the provision stood alone, that in case of any material misrepresentation as to the risk or any voluntary increase of the risk afterwards, the policy should be void, it could hardly be doubted that the words should be taken in their natural obvious meaning. The fact that with this are coupled the other provisions above referred to does not change its meaning with reference to the effect and consequence of an increase of the risk. An increase of risk which is substantial, and which is continued for a considerable period of time, is a direct and certain injury to the insurer and changes the basis upon which the contract of insurance rests; and, since there is a provision that in case of a risk which is consented to or known by the insured, and not disclosed and the assent of the assurer obtained, the policy shall become void, we do not feel at liberty to qualify the meaning of these words by holding that the policy is only suspended during the continuance of such increase of risk."

Expert evidence can not be received for the purpose of showing that leaving a dwelling house unoccupied for a considerable length of time increases its liability to be destroyed or injured by fire, but persons who are familiar with the business of insurance may testify whether such conditions affect the rate of premium.[91]

§ 256. **Repairs—Employment of mechanics.**—The entire policy, unless otherwise provided by agreement indorsed thereon, shall be void if mechanics be employed in building, altering or repairing the described premises more than fifteen days at any one time.[92]

When a building is insured it is implied that it will be used in the

[91] Luce v. Dorchester, etc., Ins. Co., 105 Mass. 297 (1870).

[92] This provision is found in the standard policies of the following states: New York, New Jersey, Connecticut, Rhode Island, Louisiana, Iowa, Wisconsin, Michigan, North Dakota, South Dakota, and North Carolina. It is not found in the standard policies in use in Maine, Massachusetts, New Hampshire and Minnesota.

ordinary way in which similar buildings are used and not set apart and wholly devoted to being kept safely. One of the incidents of such use is that of making ordinary repairs, and the general right to make such repairs is not questioned when the policy contains no special provision upon the subject.[93] A clause similar to that in the standard policy was held not to apply to ordinary and necessary repairs, as it would be unreasonable to assume that in order to protect a building from fire it was the intention to provide for its destruction by the other elements.[94]

The limitation is rendered more definite and reasonable by a time limit, and when it appears that mechanics have been employed in making repairs for more than fifteen days the policy is invalid without reference to whether such changes contributed to the loss.[95] Painters employed in repainting a building are not mechanics within this provision.[96] A similar provision was given full force and effect by the Supreme Court of the United States. The policy was to be void and of no effect if, without notice to the company and permission in writing indorsed thereon, "mechanics are employed in building, altering or repairing the premises named herein, except in dwelling houses, where not exceeding five days in any one year are allowed for repairs." The insurance was upon a courthouse, and it was held invalidated by the employment of mechanics altering or repairing the building, although the fire did not occur in consequence of such alterations and repairs. The court said:[97] "These provisions are not unreasonable. The insurer may have been willing to carry the risk at the rate charged and paid, so long as the premises continued in the condition in which they were at the date of the contract; but the company may have been unwilling to continue the contract under other and different conditions, and so it had the right to make the above stipulations and conditions on which the policy or the contract should terminate. These terms and conditions of the policy present no ambiguity whatever. The several conditions

[93] Townsend v. Northwestern Ins. Co., 18 N. Y. 168 (1858).

[94] Franklin F. Ins. Co. v. Chicago Ice Co., 36 Md. 102 (1872).

[95] Newport Improvement Co. v. Home Ins. Co., 163 N. Y. 237, 57 N. E. 475 (1900); Chamberlain v. British, etc., Assur. Co., 80 Mo. App. 589 (1899).

[96] Smith v. German Ins. Co., 107 Mich. 270, 30 L. R. A. 368 (1895). See First Cong. Church v. Holyoke, etc., Ins. Co., 158 Mass. 475, 19 L. R. A. 587 (1893).

[97] Imperial F. Ins. Co. v. Coos County, 151 U. S. 452 (1893).

were separate and distinct, and wholly independent of each other. The first three of the above conditions depend upon an actual increase of the risk by some act or conduct on the part of the insured; but the last condition is disconnected entirely from the former, whether the risk be increased or not [this last condition refers to mechanics employed in the building]. This last condition may properly be construed as if it stood alone, and a material alteration and repair of the building beyond what was incidental to the ordinary repairing necessary for its preservation, without the consent of the insurer, would be a violation of the condition of the policy, even though the risk might not have been in fact increased thereby. * * * Being a separate and valid stipulation of the parties, its violation by the assured terminated the contract of the insurer, and it could not thereafter be made liable on the contract without having waived that condition, merely because, in the opinion of the court and the jury, the alterations and repairs of the building did not in fact increase the risk. The specific thing described in the last condition as avoiding the policy if done without consent was one which the insurer had the right in its own judgment to make a material element of the contract, and, being assented to by the assured, it did not rest, in the opinion of other parties, the court or the jury, to say that it was immaterial unless it actually increased the risk."

A policy contained a provision that the "working of carpenters, roofers, gas-fitters, plumbers and other mechanics in building, altering or repairing, in the building or buildings covered by this policy, will cause a forfeiture of all claims under this policy, without the written consent of this company indorsed hereon;" also, that the policy should be void if the risk were increased by any means within the control of the insured. At the time the policy was issued the building was occupied as a grocery store by a tenant. Some time thereafter the insured executed a lease to other tenants, who contemplated changing the business to that of drying fruit. This required extensive alterations in the character of the building, and it was held that there was a deliberate attempt to change the character and occupation of the insured building from a comparatively safe to a hazardous one, and that such substantial alterations by carpenters invalidated the policy.[98] In this case the fire which destroyed the building occurred while the alterations were being made.

[98] Mack v. Rochester, etc., Ins. Co., 106 N. Y. 560, Woodruff Ins. Cas. 173 (1887).

This provision is not found in the Massachusetts form, and the subject of repairs falls under the general clause relating to the increase of the risk. In that state it is not necessary for the risk to be permanently increased. Where the lower floors of the premises were changed from two tenements into flats, new floors laid, doors changed and the stairs removed to the outside of the building, it was held that the fact that the alterations were completed before the loss occurred did not prevent the company from avoiding the policy because of such breach.[99] Where a condition of the policy was that it should be void "if the building shall be altered, enlarged, or appropriated to any other purpose than that herein mentioned, or the risk otherwise increased," it was held that a deliberate and considerable alteration of the building, not incidental to the ordinary use of the property, made by the tenant with the knowledge of the insured extending over three weeks, which, while it lasted, increased the risk, invalidated the policy, although it did not permanently increase the risk or cause the fire.[100] Where the policy was upon a "mill building and additions, including flumes, * * * and an automatic sprinkler equipment complete," and permission was given to make alterations, additions and repairs to the building and machinery, it was held that the insured might remove the sprinkler equipment for the purpose of putting in a more complete one, without violating this condition of the policy.[101] Placing and operating an engine fifty feet away from the insured building is not an alteration of the insured property, nor does it violate the condition against an increase of the risk unless expressly so provided in the policy.[102]

§ 257. **Ownership.**—If the interest of the insured is other than unconditional and sole ownership of the property, the fact must be disclosed to the company.[103] This is a reasonable provision and is

[99] Hill v. Middlesex, etc., Assur. Co., 174 Mass. 542, 55 N. E. 319 (1899).

[100] Lyman v. State, etc., Ins. Co., 14 Allen (Mass.) 329 (1867).

[101] Firemen's Ins. Co. v. Appleton, etc., Co., 161 Ill. 9, 43 N. E. 713 (1896).

[102] Schaeffer v. Farmers', etc., Ins. Co., 80 Md. 563, 45 Am. St. 361 (1895).

[103] This is found in the standard policies of New Jersey, Connecticut, Rhode Island, North Carolina, Louisiana, Iowa, North Dakota, New York, South Dakota, Wisconsin, and Michigan. It is not found in the standard policies of Massachusetts, Minnesota, Maine and New Hampshire.

binding upon the insured.[104] In discussing this provision it was said:[105] "The nature and extent of the interest of the insured are matters which are largely influential with underwriters in taking or rejecting risks and estimating premiums, and for that reason any condition respecting them in a contract is material and must be construed so as to effectuate the purposes of the parties. But while this must be done, the law assumes that the parties understood the words they have used; therefore, unless there are potential reasons to the contrary, they are bound by the legitimate and usual meaning of the phrases they employ. Now it must be observed that it is not title, but interest, that is spoken of in the clause. Title and interest are entirely different things. It was undoubtedly competent for the parties to have contracted as to title, * * * but in this case they have chosen to limit the provision to a condition of the interest, either legal or equitable. The question presented, therefore, to us now is, Was the 'interest,' legal or equitable, of D, 'unconditional and sole?' As to the meaning of these words, when used in the present connection, there seems to be a concurrence of authority. To be 'unconditional and sole' the interest must be completely vested in the assured, not contingent or conditional, nor for life or years only, nor in common, but of such a nature that the insured must stand the entire loss if the property is destroyed, and this is so whether the title was legal or equitable." This provision of the policy does not necessarily distinguish between the legal and equitable title. If the title is conditional or contingent, if it is for years only or for life, or in common, it is not an entire, unconditional and sole ownership; but the interest is the same as it affects the contract of insurance, whether the title of the insured be legal or equitable. "The purpose of this provision is to prevent a party who holds an undivided or contingent, but insurable, interest in property from appropriating to his own use the proceeds of a policy taken upon the valuation of the entire and unconditional title as if he were the sole owner, and to remove from him the temptation to perpetrate fraud or crime. For without this a person might be able to exceed the measure of an actual in-

[104] Barnard v. National, etc., Ins. Co., 27 Mo. App. 26 (1887).

[105] Hartford F. Ins. Co. v. Keating, 86 Md. 130 (1897); Imperial F. Ins. Co. v. Dunham, 117 Pa. St. 460, 2 Am. St. 686, Woodruff Ins. Cas. 153 (1888); Pennsylvania F. Ins. Co. v. Dougherty, 102 Pa. St. 568 (1883); Dupreau v. Hibernia Ins. Co., 76 Mich. 615 (1889); Ætna F. Ins. Co. v. Tyler, 16 Wend. (N. Y.) 396 (1836); Oshkosh, etc., Co. v. Germania F. Ins. Co., 71 Wis. 454, 5 Am. St. 233 (1888).

demnity. But where the entire loss, if the property is destroyed by fire, must fall upon the party insured, the reason and purpose of this provision does not seem to exist, and in the absence of any particular inquiry as to the specific nature of the title or of any express stipulation in the policy that the insured held the legal or equitable title, either being available to secure the entire, unconditional and sole ownership, the provision referred to can, we think, have no force to defeat the plaintiff's recovery in this case."[106] It is enough if the insured be the substantial equitable owner of the property insured.[107]

Where the reason for such a general condition in a printed form of a policy of insurance does not exist in a particular case, the condition itself becomes meaningless and inoperative. Hence, where a form of policy is used by the company for a particular kind of property peculiarly situated, and the policy contains conditions which are inapplicable to the subject-matter of the insurance, the conditions will be ignored in construing the contract. Thus, a person owned individually and in common with others a certain number of barrels of petroleum, which had been placed for transportation and storage in a certain pipe line. To protect himself from loss in case of fire, he took out a policy of insurance for a fixed sum on the petroleum "his own or held by him in trust for others;" and a condition in the policy provided that "if the insured is not the absolute and unconditional owner of the property insured, then this policy to be void." It was held that the condition was not, under the circumstances, applicable, and that the company was liable to the extent of the policy upon all the oil destroyed in which the insured had any interest whatever, but not for the loss of oil in which he had no interest and which the owners had in writing requested him to insure before the issuing of the policy.[108]

This provision must not be construed in a technical sense. It merely requires that the insured shall be the actual and substantial owner. Where the interest of the insured was acquired by devise "to be his forever for his own proper use, subject only to restriction and alienation until he attains a certain age, having yet thirteen years to run," it was held that he was the owner of the property within the meaning of the policy.[109]

[106] Imperial F. Ins. Co. v. Dunham, 117 Pa. St. 460 (1888).

[107] Lebanon, etc., Ins. Co. v. Erb, 112 Pa. St. 149 (1886); Martin v. State Ins. Co., 44 N. J. L. 485, 43 Am. Rep. 397 (1882).

[108] Grandin v. Rochester, etc., Ins. Co., 107 Pa. St. 26 (1884).

[109] Yost v. McKee, 179 Pa. St. 381,

There is some conflict of authority on the question of the binding effect of provisions of this character in a policy issued without a written application. The weight of authority doubtless supports the view that the insured, by accepting the policy, is charged with knowledge of its contents. Thus, it was held in Missouri that the acceptance of a policy which contained this provision, although issued on an oral application which made no statement as to title, amounts to a declaration that the title is absolute,[110] while in Michigan this is not regarded as conclusive upon the insured.[111] Where there are no special provisions in the policy requiring an exact disclosure of the entire quantity and quality of title, it is sufficient to describe it in general terms. Thus, where the true title was called for, it was held sufficient where the property was described as "his" and unincumbered, although it appeared that two mortgages had been given upon the property by previous owners, and the former owner's equity of redemption had been sold on execution to another person before the plaintiff acquired his title. But as the plaintiff at the time of the insurance had the right to redeem the equity of redemption and then to remove the other incumbrances and thus make his title absolute, there was no misrepresentation of title. "The assured had an estate in the land subject to mortgages and sales on execution, deeply incumbered but still redeemable, and therefore he had an estate to which the lien of the company would attach, and that such an interest is insurable is well settled by many cases."[112]

§ **258. Incumbrances.**—A condition in a policy that it shall be void in case the interest of the insured be other than sole and unconditional ownership refers to the quality of the estate or interest, and is not broken by incumbrances existing on the property when the insurance is effected.[113] The insured is therefore under no obligation to disclose the fact that there are mortgages or other incumbrances upon the property unless it is required by some other provision of the policy.[114] A vendor's lien for part of the purchase-

57 Am. St. 604 (1897); Barnard v. National F. Ins. Co., 27 Mo. App. 26 (1887).

[110] Overton v. American, etc., Ins. Co., 79 Mo. App. 1 (1898).

[111] Miotke v. Milwaukee, etc., Ins. Co., 113 Mich. 166, 71 N. W. 463 (1897).

[112] Buffum v. Bowditch, etc., Ins. Co., 10 Cush. (Mass.) 540 (1852).

[113] Morotock Ins. Co. v. Rodefer, 92 Va. 747, 53 Am. St. 846 (1896); Caplis v. American F. Ins. Co., 60 Minn. 376, 51 Am. St. 535 (1895).

[114] Dolliver v. St. Joseph, etc., Ins. Co., 128 Mass. 315, 35 Am. Rep. 378

money of land is not inconsistent with the entire unconditional and sole ownership within the meaning of the provision avoiding the in-

(1880); Judge v. Connecticut F. Ins. Co., 132 Mass. 521 (1882); Clay, etc., Ins. Co. v. Beck, 43 Md. 358 (1875); Ellis v. Ins. Co., 32 Fed. 646 (1887); Bowditch, etc., Ins. Co. v. Winslow, 3 Gray (Mass.) 415 (1855). Policies often contain provisions requiring the insured to disclose existing incumbrances. In Seal v. Farmers', etc., Ins. Co., 59 Neb. 253, 80 N. W. 807 (1899), it was held that a misrepresentation as to the amount of the incumbrance upon the property insured, where the policy is conditioned that it will be void if the property be mortgaged or otherwise incumbered without notice to and consent of the company indorsed thereon, will, in the absence of a waiver, avoid the policy. The fact that such mortgage was paid before the loss occurred, does not alter the legal effect of a breach of the requirement: Insurance Co. v. Wicker (Tex.), 54 S. W. 300; affirmed 93 Tex. 390, 55 S. W. 740 (1900). In Collins v. Merchants', etc., Ins. Co., 95 Iowa 540, 58 Am. St. 438 (1895), it was held that the provision that the policy should be void if the property be in any manner incumbered, "and such fact be not stated in this policy or the insured's application for insurance," is a stipulation against an incumbrance existing when the contract is made and not against future incumbrances. The court said: "If the statement was that it should be void if the property be in any manner incumbered or in litigation, there is no doubt it should be construed as covering future as well as existing incumbrances: Mallory v. Farmers' Ins. Co., 65 Iowa 450; but the policy contains more than this. It says it shall be void under these circumstances unless the fact is stated in this policy or in the insured's application for insurance. * * * Manifestly this is an existing or present one and not one created in the future. The words used are certainly open to this construction, and if so, we should adopt that most favorable to the insured under all the established tenets." In Insurance Co. v. Saindon, 53 Kan. 623, 36 Pac. 983 (1894), it was held that where the insurance policy provides against future incumbrances, the policy will be avoided if a subsequent incumbrance is created, or if an incumbrance existing at the time of the application for insurance be materially increased by a new or additional debt. But the mere subsequent renewal of a prior lien or mortgage with the accrued interest, is not an increase of such pre-existing indebtedness or the creation of a new or additional incumbrance. In Koshland v. Home, etc., Ins. Co., 31 Ore. 321, 49 Pac. 864, 50 Pac. 567 (1897), it appeared that the policy was issued with the knowledge that there was an incumbrance upon the property. The policy contained a clause rendering it invalid if the property should be incumbered in the future without the knowledge and consent of the company, and it was held that the provision was not invalidated by the making of a new mortgage for the purpose of discharging the old. In Cagle v. Chillicothe, etc., Ins. Co., 78 Mo. App. 215 (1899), where the policy contained a stipulation that "any incumbrance shall avoid the policy unless the written consent of

surance if the interest of the insured be other than such sole ownership.[115] A lease of the premises is not an incumbrance within the meaning of a condition rendering the policy void if the property is incumbered by a future mortgage or lien.[116]

§ 259. **Illustrations.**—As already noted, there is a distinction between the words title and interest as used in insurance policies. Thus, a provision that a policy shall be void if the interest of the insured

the company is obtained," and the application, which was a part of the contract, did not mention certain unsatisfied mortgages, it was held that the policy was void, although the local agent knew of the existence of the mortgages; since the secretary alone could consent to the incumbrances. But in Seal v. Farmers', etc., Ins. Co., 59 Neb. 253, 80 N. W. 807 (1899), it was held that where the application was oral and no inquiry was made as to the character and condition of the title, a failure to disclose the existence of incumbrances would not, in the absence of fraud, avoid the policy. In Flournoy v. Traders' Ins. Co., 80 Mo. App. 655 (1899), the agent issued the policy knowing of the incumbrances on the property, and it was held that the company thereby waived the stipulation against such incumbrance, notwithstanding the further stipulation that such agent was not authorized to waive, as such stipulation applied only to acts subsequent to the issuing of the policy and not to those preceding it. In Arthur v. Palatine Ins. Co., 35 Ore. 27, 57 Pac. 62 (1899), it was held that where the policy was issued on an oral application and no inquiry was made as to incumbrances, and representations were made with reference thereto, and the insured did not know that if a mortgage existed the company would not take the risk, or that the policy contained a provision making it void if there were existing incumbrances, the insurer was held to assume the risk of incumbrances. In Insurance Co. v. Wicker, 93 Tex. 390, 54 S. W. 30, 55 S. W. 74 (1900), it was held that a failure to give notice of the existence of a mortgage on the property insured when required by the terms of the policy is not waived by the insurer's knowledge of a mortgage subsequently given on the property to secure money with which to pay a mortgage existing at the time the policy was issued. See, also, McKibban v. Des Moines Ins. Co. (Iowa), 86 N. W. 38 (1901). In Parker v. Otsego, etc., Ins. Co., 47 App. Div. (N. Y.) 204 (1900), it appeared that the application was made upon a printed form furnished by the company, and that the paragraph reading, "The aforesaid premises are not incumbered by mortgage or otherwise to exceed the sum of $——," was not completed by the applicant's filling out the blank, and it was held neither an assent nor dissent to the fact of the existence of a mortgage.

[115] Boulden v. Phœnix Ins. Co., 112 Ala. 422, 20 So. 587 (1895).

[116] Read v. State Ins. Co., 103 Iowa 307, 64 Am. St. 181 (1897).

is not an entire, unconditional and sole ownership of the property means, where the interest of a mortgagee is insured, that the interest insured, namely, the mortgage lien, is an unconditional interest belonging to the mortgagee, and not a conditional or speculative one.[117] A person in whom the entire legal title is vested is the sole and unconditional owner within the meaning of the policy, although he has made a lease or bill of sale of the property, reserving title until the consideration is fully paid.[118] A person who owns the fee of property subject to a mortgage and lease for a term of years has the entire, unconditional and sole ownership of the property.[119] It is well settled that an outstanding lease does not affect the matter of ownership within this provision.[120]

Where no written application was made and no questions were asked concerning the title, it was held that the insurance was valid, although the policy contained a condition declaring it to be void if the interest of the insured was other than unconditional and sole ownership, although it appeared that he did not own the legal title and had merely purchased the property and paid therefor without having received a conveyance.[121] A vendee in possession without a deed, with an equitable right to the entire, unincumbered title is the owner of the property.[122] So, the owner of an estate in fee on a condition subsequent, who is in possession with no conditions broken, is the sole and unconditional owner of the property.[123] One who has received a deed from a married man in which his wife has not joined is the owner of the property; as the wife has no claim on the realty before the death of the husband.[124] Where the plaintiff paid a portion of the purchase-price and took possession of certain personal property under an agreement that after a certain time he would either pay the balance or resell or convey the property to the vendor, it was held that he took an absolute title, and in case of fire was entitled to collect the insurance on a policy conditioned that it was void if

[117] Hanover F. Ins. Co. v. Bohn, 48 Neb. 743, 58 Am. St. 719 (1896).

[118] Burson v. Fire Ass'n, 136 Pa. St. 267, 20 Am. St. 919 and note (1890); Johannes v. Standard Fire Office, 70 Wis. 196, 5 Am. St. 159 and note (1887).

[119] Dolliver v. St. Joseph, etc., Ins. Co., 128 Mass. 315, 35 Am. Rep. 378 (1880).

[120] Insurance Co. v. Haven, 95 U. S. 242 (1877).

[121] Dooly v. Hanover F. Ins. Co., 16 Wash. 155, 58 Am. St. 26 (1896).

[122] Bonham v. Iowa, etc., Ins. Co., 25 Iowa 328 (1868).

[123] Davis v. Pioneer Furniture Co., 102 Wis. 394 (1899).

[124] Ohio, etc., Ins. Co. v. Bevis, 18 Ind. App. 17, 46 N. E. 928 (1897).

the interest of the insured was other than sole and unconditional.[125] The fact that the property was conveyed to the insured without consideration for the purpose of placing it beyond the reach of the grantor's creditors is not a defense under this provision.[126] A married man has such an interest in the household furniture owned by his wife before marriage as constitutes him its sole and unconditional owner.[127] The fact that the legal title to the property was in another will not defeat a recovery where the insured was the beneficial owner at the time the policy was issued.[128] A married woman is the owner of her property, although her husband has a homestead interest therein.[129] So, the owner of a farm is the sole and unconditional owner of hay produced on the farm, where the hay is produced at his expense, and he owns two-thirds of it absolutely, and under a contract with a laborer is to credit him with the proceeds of the other one-third and charge him with the cost of production.[130] Where the property was insured in the name of a firm of which the insured was a member, but which had been dissolved before the issuance of the policy, it was held that the policy was valid although it contained the condition under consideration.[131]

The words "as his interest may appear" in a policy indicate uncertainty not only as to the extent, but as to the quality and character of the interest; and where it appeared that the insured, although not the owner, had an insurable interest, it was held that there was no breach of condition in the policy forfeiting it in case the interest of the insured is not truly stated in the policy, or if the interest is less than an absolute ownership.[132] A condition in a policy issued to a husband and wife that it shall be void if the subject of the insurance is a building on ground not owned by the insured in fee-simple is not broken by the fact that the fee-simple of the land is in the wife alone, as there must be an ownership in some other person

[125] Stowell v. Clark, 47 App. Div. (N. Y.) 626 (1900).

[126] Rochester Loan, etc., Co. v. Liberty Ins. Co., 44 Neb. 537, 48 Am. St. 745 and note (1895).

[127] Georgia Home Ins. Co. v. Brady (Tex. Civ. App.), 41 S. W. 513 (1897).

[128] McCoy v. Iowa, etc., Ins. Co., 107 Iowa 80, 77 N. W. 529 (1898).

[129] Sun Ins. Office v. Beneke (Tex. Civ. App.), 53 S. W. 98 (1899).

[130] Manchester F. Assur. Co. v. Abrams, 89 Fed. 932, 32 C. C. A. 426 (1898).

[131] Delaware Ins. Co. v. Bonnet, 20 Tex. Civ. App. 107, 48 S. W. 1104 (1898).

[132] Dakin v. Liverpool, etc., Ins. Co., 77 N. Y. 600 (1879).

than the insured to violate the condition.[133] A policy declared that the application was a part of the contract of insurance and was made subject to the rules of the company, which provided that the policy should be void if the application should not contain a full, fair, substantial and true representation of all the facts and circumstances respecting the property so far as within the knowledge of the insured and material to the risk. The applicant stated that she was the owner of the land upon which the building stood, and it appeared that she was a widow, and that her only title was a life estate under the will of her husband, which contained no disposition of the remainder. Her husband left two children not named in the will, and they had not during the twelve years that had elapsed since the probate of the will, of which six had passed before the application for the insurance was made, claimed the share to which they would have been entitled if he had died intestate. It was held that the answer was a sufficient description of her interest.[134]

§ 260. **Illustrations of breach of condition.**—One who owns an undivided one-half of the insured property has not the entire, unconditional and sole ownership.[135] Nor has one who has purchased property on the installment plan, the title remaining in the vendor.[136] Where the insured states in his application that he is the sole owner of the property, and it is stipulated that if his answer is untrue, or his interest other than a perfect legal and equitable ownership, the policy shall be void, there is a breach of condition where the property is owned by his wife.[137] The holder of a quitclaim deed from a second mortgagee is not the unconditional and sole owner of the property,[138] nor is a vendor after the vendee has gone into possession and paid the purchase-price;[139] nor is a surviving partner the sole owner of property belonging to the undivided partnership estate.[140] A partnership does not, within the meaning of this pro-

[133] Mascott v. First Nat'l F. Ins. Co., 69 Vt. 116, 37 Atl. 255 (1896).

[134] Allen v. Charlestown, etc., Ins. Co., 5 Gray (Mass.) 384 (1855).

[135] Sisk v. Citizens' Ins. Co., 16 Ind. App. 565, 45 N. E. 804 (1897).

[136] Dumas v. Northwestern, etc., Ins. Co., 12 App. Cas. (D. C.) 245, 40 L. R. A. 358 (1898); Geiss v. Franklin Ins. Co., 123 Ind. 172 (1889).

[137] Planters' Mut. Ins. Co. v. Loyd, 67 Ark. 584, 77 Am. St. 136 (1900); Trott v. Woolwich, etc., Ins. Co., 83 Me. 362, 22 Atl. 245 (1891).

[138] Southwick v. Atlantic, etc., Ins. Co., 133 Mass. 457 (1882).

[139] Clay, etc., Ins. Co. v. Huron, etc., Co., 31 Mich. 346 (1875).

[140] Crescent Ins. Co. v. Camp, 64 Tex. 521 (1885).

vision, own property contributed as a partner's share of the capital, but which has not been deeded to the partnership.[141] This condition is broken where the insured is the owner only of an undivided one-half interest in the property, although at the time the insurance was issued he thought he was the sole owner by virtue of an executory contract of the other owners to convey to him.[142] A person who has purchased property at a judicial sale, but whose bid has not been ratified, or the sale confirmed by the court, has not an unconditional and sole ownership of the property. In one case the court said:[143] "We have been referred to cases where it is held that when the insured is in possession under a contract of purchase, and the legal title has not passed by conveyance, the ownership is not unconditional until the purchase-money has been wholly paid;[144] but it may be doubted whether such cases are in line with the current of authority." Where the insured had received a deed of the property, upon which there was a mortgage, from her son, but failed to record it, and the mortgage had been foreclosed and the property sold, and she was not made a party to the foreclosure suit, and failed to redeem from the sale under the judgment within the time allowed by statute, it was held that she was not the sole and unconditional owner of the property within the meaning of the policy.[145] So, one who has given his bond for a debt secured by a mortgage on the premises, and is the holder of another mortgage, is not the sole and unconditional owner of the property.[146] A person who owns all the stock of a corporation is not the owner of the property of the corporation within the meaning of this provision.[147] A tenant for life can not recover on a policy which provides that there shall be no liability "if the interest of the assured is not one of absolute and sole ownership."[148] A policy of insurance issued to one whose only interest in the property is by virtue of a land contract which he holds as col-

[141] Citizens' F. Ins., etc., Co. v. Doll, 35 Md. 89, 6 Am. Rep. 360 (1871).

[142] Liverpool, etc., Ins. Co. v. Cochran, 77 Miss. 348, 26 So. 932 (1899).

[143] Hartford F. Ins. Co. v. Keating, 86 Md. 130, 63 Am. St. 499 (1897).

[144] Farmers', etc., Ins. Co. v. Curry, 13 Bush (Ky.) 312, 26 Am. Rep. 194 (1877).

[145] Breedlove v. Norwich, etc., Ins. Soc., 124 Cal. 164, 56 Pac. 770 (1899).

[146] Ordway v. Chace, 57 N. J. Eq. 478, 42 Atl. 149 (1899).

[147] Syndicate Ins. Co. v. Bohn, 65 Fed. 165, 12 C. C. A. 531 (1894).

[148] Collins v. St. Paul, etc., Ins. Co., 44 Minn. 440, 46 N. W. 906 (1890). See, also, Davis v. Iowa State Ins. Co., 67 Iowa 494, 25 N. W. 745 (1885); Garver v. Hawkeye Ins. Co., 69 Iowa 202, 28 N. W. 555 (1886).

lateral security for money advanced to the purchaser is void in its inception where it provides that it shall be void unless otherwise provided, if the interest of the insured be other than unconditional and sole ownership, or if the subject of the insurance be a building on ground not owned by the insured in fee-simple, although the recitals that the insured held the property under a land contract might protect him if he had been the absolute owner of the contract.[149]

This provision, like all others inserted for its benefit, may be waived by the company, and it is generally held that it can not dispute the validity of the policy on the ground that the insured's interest in the property was not an unconditional and sole ownership when the limited interest was fully and correctly disclosed to the agent of the company when the policy was taken out.[150]

§ 261. **Building on leased ground.**—"The entire policy, unless otherwise provided by agreement indorsed thereon, is void if the subject of the insurance be a building on ground not owned by the insured in fee-simple."[151] This provision is valid, and its breach will invalidate the policy.[152] It is violated where the applicant is the

[149] Gettelman v. Commercial, etc., Assur. Co., 97 Wis. 237, 72 N. W. 627 (1897).

[150] Clapp v. Farmers', etc., Ins. Ass'n, 126 N. C. 388, 35 S. E. 617 (1900); Westchester F. Ins. Co. v. Wagner (Tex. Civ. App.), 57 S. W. 876 (1900); London, etc., Ins. Co. v. Gerteson, 21 Ky. L. 471, 51 S. W. 617 (1899); Teutonic, etc., Ins. Co. v. Howell, 21 Ky. L. 1245, 54 S. W. 852 (1900); Porter v. Orient Ins. Co., 72 Conn. 519, 45 Atl. 7 (1900). An insurer, which, knowing that the title of the insured is less than a fee simple, issues a policy providing that it shall be void if the title of the insured is less than a fee-simple, unless otherwise provided by agreement indorsed on or annexed to the policy, thereby waives such provision, whether or not it intended to do so: Schultz v. Caledonian Ins. Co., 94 Wis. 42, 68 N. W. 414 (1896).

[151] This clause is found in the standard forms in use in New York, New Jersey, North Carolina, Connecticut, Rhode Island, Wisconsin, Louisiana, North Dakota, South Dakota, and Michigan. The Iowa form adds the words, "and the title be not evidenced by deed." It is not found in the Massachusetts, Minnesota, Maine and New Hampshire standard forms.

[152] Dowd v. American F. Ins. Co., 41 Hun (N. Y.) 139, Woodruff Ins. Cas. 176 (1886); Ben Franklin Ins. Co. v. Weary, 4 Ill. App. 74 (1879). As to buildings on leased ground generally, see Fletcher v. Commonwealth Ins. Co., 18 Pick. (Mass.) 419 (1836); Fowle v. Springfield, etc., Ins. Co., 122 Mass. 191, 23 Am. Rep. 308 (1877); Insurance Co. v. Haven, 5 Otto (U. S.) 242 (1877). Such a provision is a warranty and can not be disregarded: East Texas F. Ins.

owner in fee of only an undivided interest in the land.[153] The possession of a life estate in real estate is not a compliance with this provision.[154] It has been held that one who has the equitable right to a fee-simple title is within the provision.[155] Where no questions were asked and no representations made, it was held that one who had paid the full purchase-price for the property, but had not received his deed, was the owner of the ground in fee-simple within the meaning of this provision.[156] So, a provision avoiding the policy, if the subject of the insurance is a building on "ground not owned by the insured," is not broken if a part of the building stands on ground not owned by the insured.[157] The provision does not apply where the policy is issued on a leasehold interest.[158] Where the company knew that the building was on leased property when the policy was issued, and no indorsement showing such fact was made on the policy, it was held that it could not defeat a recovery for breach of this condition.[159] The condition is broken where the deed is delivered to a third person to hold until certain conditions are performed.[160]

§ 262. **Incumbrance by chattel mortgage.**—The policy is rendered void if a chattel mortgage is placed upon the property without the consent of the insurer.[161] In the absence of this provision the execu-

Co. v. Brown, 82 Tex. 631, 18 S. W. 713 (1891). When the insured property is described as located on a military reservation it is sufficient notice to the company that the insured does not own the title in fee; and the provision is inoperative: Broadwater v. Lion F. Ins. Co., 34 Minn. 465 (1886).

[153] Scottish, etc., Ins. Co. v. Petty, 21 Fla. 399 (1885).

[154] Garver v. Hawkeye Ins. Co., 69 Iowa 202 (1886). But see Haden v. Farmers', etc., Ass'n, 80 Va. 683 (1885).

[155] Swift v. Vermont, etc., Ins. Co., 18 Vt. 305 (1846); Pennsylvania F. Ins. Co. v. Dougherty, 102 Pa. St. 568 (1883); Elliott v. Ashland, etc., Ins. Co., 117 Pa. St. 548, 12 Atl. 676 (1888); Lewis v. New England F. Ins. Co., 29 Fed. 496 (1886).

[156] Dooly v. Hanover F. Ins. Co., 16 Wash. 155, 47 Pac. 507 (1895).

[157] Haider v. St. Paul, etc., Ins. Co., 67 Minn. 514, 70 N. W. 805 (1897).

[158] Philadelphia Tool Co. v. British, etc., Assur. Co., 132 Pa. St. 236, 19 Atl. 77 (1890).

[159] Cowell v. Phœnix Ins. Co., 126 N. C. 684, 36 S. E. 184 (1900). See, also, Clawson v. Citizens', etc., Ins. Co., 121 Mich. 591, 80 N. W. 573 (1899); Berry v. American, etc., Ins. Co., 132 N. Y. 49 (1892).

[160] Pangborn v. Continental Ins. Co., 62 Mich. 638 (1886).

[161] This clause is found in the standard forms of the following states: New Jersey, Connecticut, Rhode Island, Wisconsin, Louisiana, North Dakota, South Dakota, New York, North Carolina, and Michigan. The Iowa form adds the words,

tion of a chattel mortgage is not a violation of the provision relating to an increase of the risk, or a change in the title, interest or possession of the property.[162] But there are some authorities to the contrary. Thus, it was held that a chattel mortgage was a violation of the clause relating to the "alteration of the ownership,"[163] and that it was an "alienation in part."[164] So, in Michigan it was recently held that the execution of a chattel mortgage by a partner on the partnership chattels insured for the benefit of the firm, is such a change in the subject of the insurance as will render the policy void.[165]

This provision in the standard policy is valid and binding,[166] and the same is true of one which provides that the policy shall be void if, at the time of the execution of the policy, the property is covered by a chattel mortgage.[167]

Such conditions prohibiting incumbrances upon insured property are legal, reasonable and proper, and in line with public policy. They apply, however, only to voluntary liens and levies and not to involuntary incumbrances, such as tax liens and payments procured *in invitum*. It is said, however, that a violation of such a condition does not render a policy absolutely void, but merely voidable at the election of the insurer.[168] The provision in the standard policy refers only to the common, ordinary chattel mortgage and instruments of that general nature, use and purpose. It does not, therefore, apply to a covenant in a lease which provides that the lessor shall have a first lien on all the buildings for any unpaid rents or taxes, as such a covenant is not a chattel mortgage in the ordinary sense of the term.[169]

"judgment, mechanic's lien, or any other lien, or be or become liable in any way to any lien-holder." The clause does not appear in the standard forms of Massachusetts, Minnesota, Maine, and New Hampshire.

[162] Wytheville Ins. Co. v. Stultz, 87 Va. 629 (1891).

[163] Edmands v. Mutual, etc., Ins. Co., 1 Allen (Mass.) 311 (1861).

[164] Abbott v. Hampden, etc., Ins. Co., 30 Me. 414 (1849); Judge v. Connecticut F. Ins. Co., 132 Mass. 521 (1882).

[165] Olney v. German Ins. Co., 88 Mich. 94, 26 Am. St. 281 and note (1891).

[166] Webster v. Dwelling House Ins. Co., 53 Ohio St. 558, 30 L. R. A. 719 (1895); Brown v. Westchester F. Ins. Co., 9 Kan. App. 526, 58 Pac. 276 (1899).

[167] Crikelair v. Citizens' Ins. Co., 168 Ill. 309, 61 Am. St. 119 (1897). See, also, Wilcox v. Continental Ins. Co., 85 Wis. 193 (1893); Wierengo v. American F. Ins. Co., 98 Mich. 621 (1894).

[168] Dover Glass Works Co. v. American F. Ins. Co., 1 Marvel (Del.) 32, 65 Am. St. 264 (1895).

[169] Caplis v. American F. Ins. Co., 60 Minn. 376, 51 Am. Rep. 535 (1895).

In Nebraska and Iowa the cancellation or discharge of a mortgage on the insured chattels, given in violation of this condition before the loss occurs, revives the contract from the date of the cancellation or discharge.[170] But in Arkansas such an incumbrance avoids the contract, although it is paid before the loss occurs. The court said:[171] "The language of the clause, in its plain, ordinary and popular sense, indicates a total extinction of the policy if the property be incumbered, and not a suspended animation thereof, subject to be revived upon the payment of the mortgage debt. Courts, by interpretation, can not engraft on an insurance contract any more than on any other, a meaning foreign to that which the plain terms employed by the parties themselves convey. It is undoubtedly true that where the contract, on account of any ambiguity of the language used, is reasonably susceptible of different constructions, that construction should be adopted which is most favorable to the insured. The insurer had the right to contract against any possible risk of loss or embarrassment incident to incumbering the property insured. * * * The clause is reasonable and clear and the parties had the right to so contract."

A policy insuring both real and personal property provided that if "the property should thereafter become mortgaged or incumbered," the policy should be void, and also declared it would be forfeited if other insurance was taken out on any of such property. It was held that since the provision for forfeiture for mortgaging did

[170] Home F. Ins. Co. v. Johansen, 59 Neb. 349, 80 N. W. 1047 (1899); State Ins. Co. v. Schreck, 27 Neb. 527, Woodruff Ins. Cas. 160 (1899); Born v. Home Ins. Co., 110 Iowa 379, 81 N. W. 676 (1900); Kimball v. Monarch Ins. Co., 70 Iowa 513 (1886).

[171] German, etc., Ins. Co. v. Humphrey, 62 Ark. 348, 54 Am. St. 297 (1896). The court said: "If it be said that where the mortgage is paid off, there is no longer an incumbrance and increase of risk, still, as to whether or not the mortgage had been paid off would be the question, and one that often could not be settled without expensive litigation. The insured mortgagor might enter into collusion with the mortgagee to defraud the insurance company after the loss occurred by claiming that the mortgage had been paid off and discharged, when in fact it had not. Unfortunately all men are not honest. Without some such provision in the policy, the unscrupulous would have an inviting opportunity, after a loss, to divide the spoils, at the expense of the insurer. Doubtless some such considerations as these prompted the clause in the policy under consideration."

not provide a forfeiture for mortgaging "any" of the property, but treated "the property" as a whole, the policy would not be forfeited by a mortgage given on part of the property only.[172] A statute requiring every insurer, before issuing a policy, to examine the building or structure to be insured and fix the insurable value thereof, and providing that recovery may be had notwithstanding any subsequent change not affecting the risk, applies only to the condition of the building and structure, and does not impair or affect any condition in the policy against the making of any subsequent incumbrance without notice to and consent of the company.[173] Where the policy provided that it should become void "if the property be or become incumbered by a chattel mortgage," and no written application was made and no questions asked regarding incumbrances, it was held that the condition was broken by the existence of a chattel mortgage, although it was of record at the time the policy was issued. It was said that the great weight of authority is to the effect that where the policy contains such a stipulation, and the property at the time of the execution of the policy is covered by a mortgage, no recovery can be had unless it appears that there was a waiver or estoppel by which the company is precluded from relying on the contract.[174]

A mortgage which has been paid, but not satisfied, at the time the policy is issued, is not within this provision.[175]

§ 263. Foreclosure proceedings.—The policy is void if, with the knowledge of the insured, foreclosure proceedings are commenced or notice given of the sale of the property covered by the policy by virtue of any mortgage or trust deed.[176] This clause is peculiar to the New

[172] Born v. Home Ins. Co., 110 Iowa 379, 81 N. W. 676 (1900).

[173] Webster v. Dwelling House Ins. Co., 53 Ohio St. 558, 53 Am. St. 658 (1895). See, also, Sun Fire Office v. Clark, 53 Ohio St. 414 (1895).

[174] Crikelair v. Citizens' Ins. Co., 168 Ill. 309, 48 N. E. 167 (1897). It was so expressly held in Wilcox v. Continental Ins. Co., 85 Wis. 193, 55 N. W. 188 (1893); Wierengo v. American F. Ins. Co., 98 Mich. 621, 57 N. W. 833 (1894); Fitchburg, etc., Bank v. Amazon Ins. Co., 125 Mass. 431 (1878); Smith v. Columbia Ins. Co., 17 Pa. St. 253 (1851); Pennsylvania Ins. Co. v. Gottsman's Admrs., 48 Pa. St. 151 (1864). The principle upon which these decisions rest was recognized and applied in Reaper City Ins. Co. v. Brennan, 58 Ill. 158 (1871), and Hebner v. Sun Ins. Co., 157 Ill. 144, 41 N. E. 627 (1895).

[175] Laird v. Littlefield, 164 N. Y. 597, 58 N. E. 1089 (1900).

[176] This clause is found in the standard policies in use in the states of New Jersey, Connecticut, Rhode Island, Wisconsin, Louisiana, North Dakota, New York, North Carolina,

York form and would seem to indicate that the giving of a mortgage need not be communicated to the insurer until foreclosure proceedings are commenced.[177] As said in New York:[178] "A provision that a policy shall be void in case of foreclosure proceedings is common in insurance policies, and we must assume that experience has shown to the underwriters that such proceedings increase the risk to the insurer. The defendant might have been willing for the premium charged to insure this barn with the mortgage upon it, and yet not willing to insure it in case of proceedings to foreclose the mortgage. It did assent to the mortgage and agree that loss, if any, should be paid to the mortgagee, but it did not assent to continue the insurance in case the risk was increased by proceedings to foreclose the mortgage. Before commencing the foreclosure the plaintiff should have obtained the assent of the defendant. It might have examined the circumstances and granted such assent without any conditions, or it might have required additional premium for the increased risk. It might have refused altogether, and in that case the plaintiff could have delayed his foreclosure until the end of the year or surrendered the policy and procured insurance elsewhere. Even if the provision were found to be very inconvenient and embarrassing, there is no help for it. There it is, and we can not take it out of the policy by construction."

This provision relates only to the future, and therefore the policy is not rendered void by the fact that foreclosure proceedings are pending when the policy is issued, which fact was not disclosed to the insurer.[179] If a policy upon mortgaged property expressly provides

South Dakota, and Michigan. The Iowa clause is as follows: "Or if foreclosure proceedings be commenced or a suit begun in which ownership, title or possession is involved or disputed, or notice given of sale of any property covered in whole or in part by this policy." The clause is not found in the standard policies of Massachusetts, Minnesota, Maine or New Hampshire.

[177] Richards Ins., § 146 [citing Conover v. Mutual Ins. Co., 1 Comst. (N. Y.) 290 (1848); Judge v. Connecticut F. Ins. Co., 132 Mass. 521 (1882); Bishop v. Clay, etc., Ins. Co., 45 Conn. 430 (1878); Shepherd v. Union, etc., Ins. Co., 38 N. H. 232 (1859); Smith v. Monmouth, etc., Ins. Co., 50 Me. 96 (1863); Byers v. Farmers' Ins. Co., 35 Ohio St. 606, 35 Am. Rep. 623 (1880)]. But see Western, etc., Ins. Co. v. Riker, 10 Mich. 279 (1862).

[178] Titus v. Glens Falls Ins. Co., 81 N. Y. 410, Woodruff Ins. Cas. 176 (1880); Quinlan v. Providence, etc., Ins. Co., 133 N. Y. 356, 31 N. E. 31 (1892).

[179] Orient Ins. Co. v. Burrus (Ky.), 63 S. W. 453 (1901).

that it shall become absolutely void upon the commencing of proceedings for foreclosure of the mortgage without the written consent of the insurer, and the mortgage by its terms is subject to foreclosure if the taxes upon the property are permitted to become delinquent, it is invalidated when the property is advertised for sale on account of such default.[180] To render the policy void for violation of this provision it is not necessary to restore any part of the premium, as this is to be done only when the policy is returned for cancellation.[181] Under a provision in the policy that it shall be void unless otherwise provided by agreement thereon, if, with the knowledge of the insured, proceedings be commenced to foreclose a mortgage on the property, and that no condition of the policy can be waived except by writing thereon, such foreclosure, without an indorsement on the policy, avoids it, although notice of the foreclosure is given to the agent who issued the policy.[182] Where a policy insuring a mortgagee's interest was excepted from the condition that it should be void if foreclosure proceedings should be commenced against the property without the knowledge of the mortgagee, it was held that the policy was not invalidated as to him by the foreclosure of a judgment lien against the property by a third party.[183]

A provision to the effect that the "entry of a foreclosure of a mortgage should be deemed an alienation of the property" does not import a complete foreclosure.[184] Where the policy contained a provision that it should be void "if, with the insured's knowledge, foreclosure proceedings be commenced or notice of sale given of any property covered by this policy by virtue of any mortgage," it was held that where the mortgagors and another party gave the assignee of the mortgage a personal judgment note for the balance due on the mortgage, a judgment thereafter entered on the note was not a foreclosure of the mortgage within the meaning of the provision.[185]

[180] Springfield, etc., Co. v. Traders' Ins. Co., 151 Mo. 90, 74 Am. St. 521 (1899). See, also, Horton v. Home Ins. Co., 122 N. C. 498, 65 Am. St. 724 and note (1898).

[181] Norris v. Hartford F. Ins. Co., 55 S. C. 450, 33 S. E. 566 (1899).

[182] Woodside Brewing Co. v. Pacific F. Ins. Co., 159 N. Y. 549, 54 N. E. 1095 (1899).

[183] Sun Ins. Office v. Beneke (Tex. Civ. App.), 53 S. W. 98 (1899).

[184] McIntire v. Norwich F. Ins. Co., 102 Mass. 230, 3 Am. Rep. 458 (1869). In Pennsylvania the mere issuance of a *scire facias* on the property does not invalidate the policy: Weiss v. American F. Ins. Co., 148 Pa. St. 349, 23 Atl. 991 (1892).

[185] Collins v. London Assur. Corp., 165 Pa. St. 298, 30 Atl. 924 (1895).

An illegal foreclosure sale made without the consent of the insured will not cause a forfeiture of the policy.[186] Where there is a foreclosure sale, and the order of confirmation is thereafter set aside for irregularity, the interest of the mortgagor remains and is protected by the policy.[187]

§ 264. **Generation of illuminating gas.**—"The policy is rendered void if illuminating gas or vapor is generated in or adjacent to the insured buildings for use therein."[188] The prohibition is upon the generation of gas or vapor, and not upon its use for lighting the building. Where the policy contained a clause prohibiting, unless by special agreement indorsed on the policy, "the generating or evaporating within the building or contiguous thereto of any substance for a burning gas or the use of gasoline for lighting," and the plaintiffs constructed works fifty feet from the building for the manufacture of gas from gasoline which was conducted to the building through pipes, it was held that the gas works were not contiguous to the building within the meaning of the policy.[189]

VIII. Change in Interest, Title or Possession.

*This entire policy shall be void * * * if any change, other than by the death of an insured, take place in the interest, title, or*

[186] Niagara F. Ins. Co. v. Scammon, 144 Ill. 490, 28 N. E. 919, 32 N. E. 914, 19 L. R. A. 118 (1893); Richland, etc., Ins. Co. v. Sampson, 38 Ohio St. 672 (1883); Georgia, etc., Ins. Co. v. Kinnier, 28 Gratt. (Va.) 88 (1877).

[187] Richland, etc., Ins. Co. v. Sampson, 38 Ohio St. 672 (1883). In this case the insured retained an insurable interest at the time of the fire. There was no provision in the policy relating to a change of interest in the property, and the question was whether before the fire the insured had lost all insurable interest.

[188] This clause is found in the standard policies in use in the states of New York, New Jersey, Connecticut, Rhode Island, Louisiana, North Dakota, South Dakota, Michigan, North Carolina, Iowa, and Wisconsin. It is not found in the standard policies of Massachusetts, Minnesota, Maine or New Hampshire.

[189] Arkell v. Commerce Ins. Co., 69 N. Y. 191, 25 Am. Rep. 168 (1877). A condition in a policy of insurance upon goods "contained in a brick building situate, etc.," against "lighting the premises insured, by camphine or spirit gas," held to be good and to preclude the use of spirit gas as a means of lighting in and about the goods at the place where they were described to be: Stettiner v. Granite Ins. Co., 5 Duer (N. Y.) 594 (1856).

possession of the subject of insurance (except change of occupants without increase of hazard), whether by legal process or judgment, or by voluntary act of the insured or otherwise.[190]

§ **265. Scope of provision.**—This provision is very broad, and provides that notice of all such changes must be given to the company in order that it may cancel the policy if it desires so to do. But under it only material changes in the title avoid the policy.[191] The appointment of a receiver is not such a change in the title or possession of the property as to avoid a policy which contains the provision that "if any change takes place in the title or possession of the property, whether by sale or judicial decree, without notice to the company, and its consent indorsed thereon, then the policy shall be void;"[192] nor is a change of receivers such a change

[190] This clause is found in the standard policies of New York, New Jersey, Connecticut, Rhode Island, Wisconsin, Louisiana, North Dakota, South Dakota, Michigan and North Carolina. The Iowa form is as follows: "Or if any change or diminution other than by the death of the insured take place in the interest, title or possession of the subject of the insurance (except change of occupants without increase of hazard); or if any other person than the insured now have or shall hereafter acquire any interest in or lien on the property insured, or any part thereof; or if this policy be assigned before a loss." The standard forms of Massachusetts, Minnesota and Maine provide that the policy shall be void if "without such assent the said property be sold or the policy assigned." The New Hampshire policy provides that the policy shall be "void and inoperative during the existence or continuance of the acts or conditions of things stipulated against as follows: * * * or if, without such assent, the said property shall be sold, or this policy assigned."

[191] Barnes v. Union, etc., Ins. Co., 51 Me. 110, 81 Am. Dec. 562, and note (1863). See notes in 59 Am. Dec. 307 and 28 Am. Dec. 154. As to the effect of a temporary alienation, see Hill v. Middlesex, etc., Assur. Co., 174 Mass. 542 (1899). Where the insurer consented to the transfer it was held that the provision was violated by a retransfer without the consent of the company: St. Onge v. Westchester F. Ins. Co., 80 Fed. 703 (1897). A change which increases the interest of the insured is not such a change of ownership as requires notice to be given to the company, under the terms of a subrogation contract which provides that the mortgagee shall notify the company of any change in the interest: Dodge v. Hamburg, etc., Ins. Co., 4 Kan. App. 415, 46 Pac. 25 (1896). See § 46, *supra*.

[192] Georgia, etc., Ins. Co. v. Bartlett, 91 Va. 305, 50 Am. St. 832 (1895). See also, Union Bank of Chicago v. Kansas City Bank, 136 U. S. 223 (1890).

of possession or title as will invalidate the policy.[193] Where, after the sale of property under foreclosure and before the expiration of the time to redeem, property is insured for the benefit of a mortgagee, as its interest may appear, and the mortgagee pays the premium, the non-redemption from the mortgage sale by the owner of the property does not work an alienation of the property so as to defeat the policy.[194]

An agreement between the owner of the property and another person to represent to the creditors of the owner, for the purpose of preventing a levy and attachment, that the property had been sold to such other person, does not avoid the policy.[195]

Like other provisions for the benefit of the insurer, this provision against alienation may be waived.[196] The notice may be given to the person who signed the policy, as the agent of the company, when the insured has no notice that such person has ceased to be an agent.[197]

§ **266. Transfer of part interest.**—Whether a transfer of a part interest in the insured property invalidates a policy depends upon the particular language of the provision. Where the prohibition is merely upon the sale or conveyance of the property it is held that it is not violated by the sale of anything less than the entire interest of the insured.[198] Conditions restricting the right of alienation are strictly construed against the insurer. The general rule is that such a condition refers only to an absolute transfer of the entire interest of the insured which completely divests him of his insurable interest. Any sale or transfer short of this is not within the scope of such a condition.[199] But a provision to the effect that the policy shall be

[193] Thompson v. Phenix Ins. Co., 136 U. S. 287 (1890).

[194] Washburn Mill Co. v. Fire Ass'n, 60 Minn. 68, 51 Am. St. 500 (1895).

[195] Orrell v. Hampden F. Ins. Co., 13 Gray (Mass.) 431 (1859).

[196] Stuart v. Reliance F. Ins. Co. (Mass.), 60 N. E. 929 (1901).

[197] Whitney v. American Ins. Co. (Cal.), 56 Pac. 50 (1899). A breach of this condition renders the policy *ipso facto* void: Farmers', etc., Ins. Ass'n v. Price, 112 Ga. 264, 37 S. E. 427 (1900). As elsewhere noted, in some states the effect is to suspend the policy. Provisions forbidding a change of title without the consent of the insurer are reasonable and have always been enforced: Cummins v. National F. Ins. Co., 81 Mo. App. 291 (1899).

[198] Cowan v. Iowa State Ins. Co., 40 Iowa 551, 20 Am. Rep. 583 (1875); Scanlon v. Union F. Ins. Co., 4 Biss. (C. C.) 511 (1869). See also, Stetson v. Massachusetts, etc., Ins. Co., 4 Mass. 330, 3 Am. Dec. 217 (1808).

[199] Clinton v. Norfolk, etc., Ins. Co., 176 Mass. 486, 57 N. E. 998, 79 Am.

void if there is a sale, transfer or change of title of the insured property, is broken by a conveyance of an undivided interest in the property, although the remaining interest of the insured exceeds in value the amount of the policy.[200]

A conveyance of an undivided one-half interest in the property violates a condition which forbids a change in the title or possession of the property, whether by sale, lease, legal process, judicial decree, or voluntary transfer without the consent of the company.

§ 267. **Executory contract of sale.**—The execution of a contract of sale, by the terms of which the title is to remain in the vendor until the purchaser pays the deferred payments, is not a violation of the condition which forbids any change in the title of the insured property.[201] So, the condition is not broken by a contract of sale and the part payment of the purchase-money with a provision for the giving of possession at a future date, where the loss occurs before that time.[202] But where, under a contract for the sale of real estate, the purchaser has taken possession, and nothing remains to be done but to make the deed and pay the balance of the purchase price, there is a breach of condition, although the contract provides that it is to become of no effect if default is made in the payments at the stipulated time.[203] It was held that the condition was broken by the execution of a written contract of sale which passed the equitable title and beneficial interest.[204] In this case the court said: "The rule seems to be general that if the insured, in making a transfer of the title,

St. 325 (1900), and cases there cited. See note to Lane v. Maine, etc., Ins. Co., 28 Am. Dec. 150 (1835).

[200] Western, etc., Ins. Co. v. Riker, 10 Mich. 279 (1862).

[201] Home Ins. Co. v. Bethel, 142 Ill. 537, 32 N. E. 510 (1892). See also, Grable v. German Ins. Co., 32 Neb. 645, 49 N. W. 713 (1891). *Contra:* Skinner v. Houghton, 92 Md. 68, 48 Atl. 85 (1900). A condition prohibiting any sale or transfer, or any change in the possession of the property, does not apply to a mere executory contract for a sale without change of possession: Browning v. Home Ins. Co., 71 N. Y. 508, 27 Am. Rep. 86 (1878); Forward v. Continental Ins. Co., 142 N. Y. 382, 25 L. R. A. 637 (1894).

[202] Kempton v. State Ins. Co., 62 Iowa 83, 17 N. W. 194 (1883).

[203] Davidson v. Hawkeye Ins. Co., 71 Iowa 532, 32 N. W. 514, 60 Am. Rep. 818 (1887). A transfer from a mortgagor to a mortgagee before the fire, which is not accepted until the day after the fire, will not avoid the policy: Pioneer Sav., etc., Co. v. Providence, etc., Ins. Co., 17 Wash. 175, 38 L. R. A. 397 (1897).

[204] Cottingham v. Fireman's Fund Ins. Co., 90 Ky. 439, 14 S. W. 417, 9 L. R. A. 627 (1890).

retains an interest in any of the insured property, the policy is not vacated by a sale. Pursuant to this rule, it has been held in a number of cases, and by elementary writers, that the sale, in order to vacate the policy, must be of the legal title; that the sale of a mere equity, the vendor holding the legal title, will not suffice to vacate the insurance. It is believed that the rationale of this rule is that the vendor in such cases, as the owner of the legal title, he not having parted with it, retains the risk of the property—that is, the risk of the property remains with the legal title and the loss or destruction of the property falls upon the owner of the legal title; and under that view it is believed that if the owner has sold the equitable, but not the legal title, he has not parted with his insurable interest in the property. But in this state the purchaser of real estate by a title bond takes the risk of the property. He is the beneficial owner of it, and its loss or destruction falls upon him and not the vendor. It is the vendor's parting with the beneficial interest in the property that vacates his contract of insurance, and where the sale of the legal title is necessary to deprive the owner of such interest, the sale of the equitable title only will not be sufficient for that purpose. But where, as in this state, the beneficial interest is passed to the vendee of the equitable title, the contract of insurance is vacated by such sale. The vendee in such cases assumes all risk of loss or destruction of the property."

Where the policy contains a provision invalidating it "if any change take place in the interest, title or possession of the subject of insurance," it is not invalidated by an agreement to exchange the insured property, which was to take effect on a specified date in the future, but which was never in fact executed. The court said that "it was simply an agreement to in the future make such a change, which was never done. It is true that the policy stipulates against a change of interest, or change of title, or change of possession, but there was no change of either.[205] A contract for the sale of the insured property does not violate this condition where the property is not passed to the purchaser, although a portion of the purchase-money is paid.[206] The word "interest" is broader than the word "title,"

[205] Erb v. German, etc., Ins. Co., 98 Iowa 606, 67 N. W. 583, 40 L. R. A. 845 (1896). See also, Washington F. Ins. Co. v. Kelly, 32 Md. 421, 3 Am. Rep. 149 (1870).

[206] Boston Ice Co. v. Royal Ins. Co., 12 Allen (Mass.) 381, 90 Am. Dec. 151 (1866).

and includes both legal and equitable rights. Hence, where the policy provides that it shall be void if any change takes place in the interest of the insured, whether by voluntary act of the insured or otherwise, an executory agreement to convey the insured premises under which the vendee takes possession and pays part of the purchase price is a breach of the condition.[207]

§ 268. **Incumbrances.**—The weight of authority supports the view that the execution of a mortgage on the insured premises is not a breach of the condition against a change of title, interest or possession.[208] Nor is this provision violated by the existence of a mortgage on the property at the time the policy was issued, as the condition refers only to subsequent changes.[209] Policies sometimes contain conditions requiring the disclosure of existing incumbrances, and rendering the contract void if this is not done. No such provision appears in the standard form under consideration.[210]

Of course the execution of a mortgage for the purpose of paying off a mortgage which was in existence at the time the policy was

[207] Gibb v. Philadelphia F. Ins. Co., 59 Minn. 267, 61 N. W. 137, 50 Am. St. 405 (1894); Trumbull v. Portage, etc., Ins. Co., 12 Ohio 305 (1843). As to the meaning of the word "interest," see Walradt v. Phœnix Ins. Co., 136 N. Y. 375, 32 N. E. 1063, 32 Am. St. 752 (1893). In Skinner & Sons' Co. v. Houghton, 92 Md. 68, 48 Atl. 85 (1900), it was held that a contract for the sale of the insured premises was a breach of a condition which provided that the policy should be void if any change take place in the interest, title or possession of the property, whether by legal process or by voluntary act of the insured.

[208] Judge v. Connecticut F. Ins. Co., 132 Mass. 521 (1882); Commercial Ins. Co. v. Spankneble, 52 Ill. 53 (1869); Peck v. Girard, etc., Ins. Co., 16 Utah 121, 67 Am. St. 600 (1897); Barry v. Hamburg, etc., Ins. Co., 110 N. Y. 1 (1888); Conover v. Mutual Ins. Co., 1 N. Y. 290 (1848); Hartford, etc., Ins. Co. v. Lasher Stocking Co., 66 Vt. 439, 29 Atl. 629, 44 Am. St. 859 (1894); Rice v. Tower, 67 Mass. 426 (1854); Loy v. Home Ins. Co., 24 Minn. 315, 31 Am. Rep. 346 (1877); Byers v. Farmers' Ins. Co., 35 Ohio St. 606, 35 Am. Rep. 623 (1880); Sun Fire Office v. Clark, 53 Ohio St. 414, 42 N. E. 248, 38 L. R. A. 562 (1895); Smith v. Monmouth, etc., Ins. Co., 50 Me. 96 (1863); Taylor v. Merchants', etc., Ins. Co., 83 Iowa 402, 49 N. W. 994 (1891); Germania F. Ins. Co. v. Stewart, 13 Ind. App. 627, 42 N. E. 286 (1895); Forehand v. Niagara Ins. Co., 58 Ill. App. 161 (1894). See also, Nussbaum v. Northern Ins. Co., 37 Fed. 524, 1 L. R. A. 704 (1889).

[209] Morotock Ins. Co. v. Rodefer, 92 Va. 747, 53 Am. St. 846 (1896).

[210] See note to § 258, *supra.*

executed is not a breach of this provision against the creation of a future incumbrance.[211]

But there are some authorities which hold that the execution of a mortgage results in a change of the title or interest of the mortgagor. Thus, in Texas it was held that the execution of a mortgage on the insured property is a breach of the condition against any "change in the interest of the insured, whether by sale, transfer or conveyance."[212] So, the giving of a mortgage with a power of sale has been held a violation of the condition against alienation.[213] The execution of a chattel mortgage on partnership property by one of the partners to secure a personal debt violates a condition which provides that if any change takes place in the interest, title, or possession of the property, the policy shall be void.[214]

A mortgage on the insured property by a person who holds the legal title will not avoid a policy under a prohibition against changes in the title without the consent of the company indorsed upon the policy, if such mortgage is merely the obligation of the mortgagor and not of the insured.[215] The giving of a mortgage is a material alteration of the ownership of the property insured, under a policy which provides that "all alienations and alterations in the ownership, situation or state of the property" shall invalidate the policy.[216] Where the policy contains a condition against a change of title and the creation of incumbrances, a mere paper transfer, without a bill of sale and without consideration, and without a delivery of the possession of the property, is not a breach of the condition.[217] Where the policy contains a condition that it shall be void if there is any change in the title, or the creation of an incumbrance, and to which is attached a mortgage slip protecting the rights of a mortgagee against a breach of condition by the mortgagor, the rights of such mortgagee are not

[211] McKibban v. Des Moines, etc., Ins. Co. (Iowa), 86 N. W. 38 (1901); Aurora F. Ins. Co. v. Eddy, 55 Ill. 213 (1870); Koshland v. Home, etc., Ins. Co., 31 Ore. 321, 49 Pac. 864, 50 Pac. 567 (1897).

[212] East Texas F. Ins. Co v. Clarke, 79 Tex. 23, 15 S. W. 166, 11 L. R. A. 293 (1890).

[213] Sossaman v. Pamlico, etc., Ins. Co., 78 N. C. 145 (1878).

[214] Olney v. German Ins. Co., 88 Mich. 94, 50 N. W. 100, 13 L. R. A. 684 (1891).

[215] Hoose v. Prescott Ins. Co., 84 Mich. 309, 47 N. W. 587, 11 L. R. A. 340 (1890).

[216] Edmands v. Mutual, etc., Ins. Co., 1 Allen (Mass.) 311 (1861).

[217] Forward v. Continental Ins. Co., 142 N. Y. 382, 25 L. R. A. 637 (1894).

affected by a transfer of the title or the creation of an incumbrance by the mortgagor.[218]

§ 269. **Defeasible conveyances.**—A deed absolute in form, but intended as a mortgage, is not a breach of the condition that the policy will be void if there is any change in the title or possession.[219] Such conveyances are treated as simply incumbrances, and hence come within the rule stated in the preceding section. The fact that a deed absolute in form is recorded, and the defeasance is not, does not change the rule, although a statute provides that persons having no notice of an unrecorded instrument of defeasance shall not be affected thereby.[220] A conveyance of real estate by a debtor to a creditor under the provisions of the Georgia code is not an alienation of the property within the prohibition against a change of title.[221]

§ 270. **Invalid conveyances.**—A deed to the property covered by the policy, executed by the insured while insane, is not a violation of the condition.[222] So, the rights of the insured are not affected by a sale of the property made by her husband without her consent.[223] But a voluntary conveyance is a breach of the condition against alienation, although it is without consideration.[224]

[218] Phenix Ins. Co. v. Omaha Loan, etc., Co., 41 Neb. 834, 60 N. W. 133, 25 L. R. A. 679 (1894); Boyd v. Thuringia Ins. Co. (Wash.), 65 Pac. 785 (1901).

[219] German Ins. Co. v. Gibe, 162 Ill. 251, 44 N. E. 490 (1896); Barry v. Hamburg, etc., Ins. Co., 110 N. Y. 1, 17 N. E. 405 (1888). *Contra:* Western, etc., Ins. Co. v. Riker, 10 Mich. 279 (1862); Adams v. Rockingham, etc., Ins. Co., 29 Me. 292 (1849); Tomlinson v. Monmouth, etc., Ins. Co., 47 Me. 232 (1859). But in Bemis v. Harbor Creek, etc., Ins. Co. (Pa.), 49 Atl. 769 (1901), it was held that a deed absolute in form, and containing no intimation that it is not an absolute conveyance, is a breach of the condition.

[220] Bryan v. Traders' Ins. Co., 145 Mass. 389, 14 N. E. 454 (1887). See Foote v. Hartford F. Ins. Co., 119 Mass. 259 (1876); Dailey v. Westchester F. Ins. Co., 131 Mass. 173 (1881).

[221] Phœnix Ins. Co. v. Asberry, 95 Ga. 792, 22 S. E. 717 (1895).

[222] Gerling v. Agricultural Ins. Co., 39 W. Va. 689, 20 S. E. 691 (1894).

[223] Commercial Ins. Co. v. Spankneble, 52 Ill. 53, 4 Am. Rep. 582 (1869); German Ins. Co. v. York, 48 Kan. 488, 29 Pac. 586, 30 Am. St. 313 (1892).

[224] Home F. Ins. Co. v. Collins (Neb.), 85 N. W. 54 (1901); Brown v. Cotton, etc., Ins. Co., 156 Mass. 587, 31 N. E. 691 (1892).

§ 271. **Sale with purchase-money mortgage.**—A condition prohibiting a change of title, interest or possession is broken by the execution and delivery of a deed and the taking back of a mortgage to secure the payment of the purchase-money.[225] The contrary is held in Ohio on the theory that only a transfer of the entire interest of the insured violates this condition.[226]

§ 272. **Conveyance to the wife of insured.**—A transfer of the insured property to a third party, and by such party to the wife of the insured, is a breach of this condition and renders the policy void.[227] A marriage contract conveying land to the wife, but providing for a reversion should she prove unfaithful or fail to survive the grantor, vests such a title in the wife as to come within the prohibition against change of title, and the fact that after the loss the husband secured a divorce can not authorize a recovery by the husband on the policy.[228] Under the Illinois statute, which provides that no conveyance of a homestead estate shall be valid unless signed and acknowledged by the wife, it is held that a conveyance by the insured to his wife does not constitute such a change of title as would avoid the policy, where the wife does not join in the execution and acknowledgment of the deed.[229]

§ 273. **Transfers by and between partners.**—A condition making the policy void if there is any change in the title or interest of the insured without the consent of the company is not violated by the

[225] Savage v. Howard Ins. Co., 52 N. Y. 502, 11 Am. Rep. 741 (1873); Kitts v. Massasoit Ins. Co., 56 Barb. (N. Y.) 177 (1867); Tittemore v. Vermont, etc., Ins. Co., 20 Vt. 546 (1848). In Sanders v. Hillsborough, etc., Ins. Co., 44 N. H. 238 (1862), notice of the transaction was given to the company and consent to the continuance of the insurance was indorsed on the policy. See also, Farmers' Ins. Co. v. Archer, 36 Ohio St. 608 (1881); California State Bank v. Hamburg, etc., Ins. Co., 71 Cal. 11, 11 Pac. 798 (1886).

[226] Blackwell v. Miami, etc., Ins. Co., 48 Ohio St. 533, 29 N. E. 278, 14 L. R. A. 431 (1891).

[227] Walton v. Agricultural Ins. Co., 116 N. Y. 317, 22 N. E. 443, 5 L. R. A. 677 (1899); Baldwin v. Phœnix Ins. Co., 60 N. H. 164 (1880); Langdon v. Minnesota, etc., Ass'n, 22 Minn. 193 (1875). See also, Oakes v. Manufacturers', etc., Ins. Co., 131 Mass. 164 (1881); Glaze v. Three Rivers, etc., Ins. Co., 87 Mich. 349, 49 N. W. 595 (1891).

[228] Cummins v. National F. Ins. Co., 81 Mo. App. 291 (1899).

[229] Kitterlin v. Milwaukee, etc., Ins. Co., 134 Ill. 647, 25 N. E. 772, 10 L. R. A. 220 (1890).

sale by one partner to another of his interest in the property, as this provision has no reference to a transfer of interest between partners.[230] This is the general rule, but in Iowa, under an insurance policy on partnership property, which provided that it should be void, "if the title of the property is transferred, incumbered or changed," a sale by one partner of his interest to another partner will avoid the policy. It was held that the condition was broken where two of the partners sold and delivered their interests to the other partner. The court said: "This policy is conditioned against the property being sold or transferred, or any change taking place in the title and possession. Prior to the sale and delivery to the plaintiff the title and possession were in the firm, consequently there was not only a change and transfer in the title but also in the possession. If it should be said that the title was in the individuals, and not in the firm, still there was a change in the possession, for unquestionably it was the firm that was using and had possession of the property."[231] So, it was held that the retiring of one partner from participation in the business management or control of the partnership business, reserving to himself simply the right to see that the stock of goods is kept up to its value at the time of re-

[230] Wood v. American F. Ins. Co., 149 N. Y. 382, 52 Am. St. 733 (1896); Phenix Ins. Co. v. Holcombe, 57 Neb. 622, 73 Am. St. 532 (1899); Drennen v. London Assur. Corp., 20 Fed. 657 (1884); Burnett v. Eufaula, etc., Ins. Co., 46 Ala. 11 (1871); Sun Fire Office v. Wich, 6 Colo. App. 103, 39 Pac. 587 (1895); Powers v. Guardian, etc., Ins. Co., 136 Mass. 108, 49 Am. Rep. 20 (1883); New Orleans Ins. Ass'n v. Holberg, 64 Miss. 51, 8 So. 175 (1886); Wilson v. Genesee, etc., Ins. Co., 16 Barb. (N. Y.) 511 (1853); Hoffman v. Ætna F. Ins. Co., 32 N. Y. 405, 88 Am. Dec. 337 (1865); Tallman v. Atlantic, etc., Ins. Co., 29 How. Pr. (N. Y.) 71 (1865); West v. Citizens' Ins. Co., 27 Ohio St. 1, 22 Am. Rep. 294 (1875); Texas, etc., Ins. Co. v. Cohen, 47 Tex. 406, 26 Am. Rep. 298 (1877); Virginia, etc., Ins. Co. v. Vaughan, 88 Va. 832, 14 S. E. 754 (1892). Agreement of one partner to sell his interest to another: Georgia, etc., Ins. Co. v. Hall, 94 Ga. 630, 21 S. E. 828 (1894); Allemania F. Ins. Co. v. Peck, 133 Ill. 220, 24 N. E. 538, 23 Am. St. 610 (1890).

[231] Oldham v. Anchor, etc., Ins. Co., 90 Iowa 225, 57 N. W. 861 (1894). As supporting the rule that a transfer from one partner to another is within this provision, see Buckley v. Garrett, 47 Pa. St. 204 (1864); Keeler v. Niagara F. Ins. Co., 16 Wis. 550, 84 Am. Dec. 714 (1863); Finley v. Lycoming, etc., Ins. Co., 30 Pa. St. 311, 72 Am. Dec. 705 (1858); Hartford F. Ins. Co. v. Ross, 23 Ind. 179, 85 Am. Dec. 452 (1864); Tillou v. Kingston, etc., Ins. Co., 5 N. Y. 405 (1851).

tiring as security for the payment of the amount allowed by the other partner for his interest, is such a change of possession, if not of title, as to avoid the policy on the goods, under a policy which provides that it shall be void if the title or possession of the property is changed.[232]

So, a change in the firm by which a third party becomes a member of the firm is a violation of the condition and renders the policy void.[233]

In a recent New York case, where the policy contained a provision that it should be void "if the property be sold or transferred, or any change takes place in the title or possession," the court said:[234] "The contract of insurance is peculiarly personal in its nature, and the success of the business of underwriting depends largely upon what is known as the moral hazard. It is a well established principle of the common law that every man has the right to determine with whom he will enter into contract obligations. The insurer is induced to issue or withhold its policy after carefully scrutinizing the character of the applicant for insurance. It is of the utmost importance to the company to ascertain who is to be vested with the title and possession of the property sought to be insured. It would be a harsh and indefensible rule that required an underwriter who had insured an individual on a stock of goods in a store to continue the insurance after the insured had taken in two partners and formed a firm wherein each partner was vested with an undivided one-third interest of the

[232] Jones v. Phœnix Ins. Co., 97 Iowa 275, 66 N. W. 169 (1896).

[233] Drennen v. London Assur. Corp., 20 Fed. 657 (1884); Firemen's Ins. Co. v. Floss, 67 Md. 403, 10 Atl. 139 (1887). See also, Virginia, etc., Ins. Co. v. Thomas, 90 Va. 658, 19 S. E. 454 (1894); Card v. Phœnix Ins. Co., 4 Mo. App. 424 (1877).

[234] Germania F. Ins. Co. v. Home Ins. Co., 144 N. Y. 195, 26 L. R. A. 591, 43 Am. St. 749, 39 N. E. 77 (1894). See cases cited in Beebe v. Ohio, etc., Ins. Co., 93 Mich. 514, 18 L. R. A. 481 (1892). See also, as sustaining this doctrine, Drennen v. London Assur. Corp., 20 Fed. 657 (1884); Card v. Phœnix Ins. Co., 4 Mo. App. 424 (1877); Malley v. Atlantic, etc., Ins. Co., 51 Conn. 222, 250 (1883). The mere dissolution of a firm does not destroy the joint interest of the copartners in the partnership property or make them tenants in common. The property continues as partnership property until it is disposed of. Until this is done there is no violation of the condition against a change in the title. But a dissolution of the partnership and a division of the partnership property prior to the fire is a violation of the condition: Roby v. American, etc., Assur. Co., 120 N. Y. 510, 24 N. E. 808 (1890); Dreher v. Ætna Ins. Co., 18 Mo. 128 (1853).

property covered by the policy without having been offered an opportunity to examine into the moral and business character of the two strangers to the original contract. This right of the insurance company was in no wise invaded when this court held that a sale by one partner to another of his interest, where both were insured, did not avoid the policy. It is only when a stranger is to be brought into contractual relations with the insurance company that the consent of the latter is essential."

§ 274. **Transfers between joint owners.**—The provision prohibiting the sale of insured property does not prevent sales and transfers of interests as between joint owners.[235] Thus, a transfer from one joint tenant to another such tenant is not an alienation of the property.[236] But a transfer from one tenant in common to another is within the provision against "alienation by sale or otherwise."[237]

§ 275. **Legal process or judgment.**—The clause in the standard policy forbids alienation or change of interest by legal process or judgment as well as by voluntary acts of the insured. This provision is valid; and its violation, as by confessing judgment, will render the insurance void.[238] It is not, however, broken by the seizure of the goods on execution,[239] as the mere levy of an execution is not an alienation of the property so long as the right of redemption remains.[240]

A change of title or interest is not effected by a delivery of an execution to an officer and a levy thereunder. As said in New York:[241] "The interest which a person may have in property is affected in many ways without producing a change in such interest

[235] Hoffman v. Ætna F. Ins. Co., 32 N. Y. 405, 88 Am. Dec. 337 (1865).

[236] Lockwood v. Middlesex, etc., Assur. Co., 47 Conn. 553 (1880); Tillou v. Kingston, etc., Ins. Co., 7 Barb. (N. Y.) 570 (1850).

[237] Buckley v. Garrett, 47 Pa. St. 204 (1864).

[238] Dover Glass Works v. American F. Ins. Co., 1 Marvel (Del.) 32, 29 Atl. 1039, 65 Am. St. 264 (1894). See Olney v. German Ins. Co., 88 Mich. 94, 26 Am. St. 281 (1891). A judgment entered on a warrant of an attorney is an incumbrance: Pennsylvania, etc., Ins. Co. v. Schmidt, 119 Pa. St. 449 (1889).

[239] Rice v. Tower, 1 Gray (Mass.) 426 (1854).

[240] Clark v. New England, etc., Co., 6 Cush. (Mass.) 342, 53 Am. Rep. 44 (1850); Greenlee v. North British, etc., Ins. Co., 102 Iowa 427, 63 Am. St. 455 (1897). See, also, Wood v. American F. Ins. Co., 149 N. Y. 382, 52 Am. St. 733, and note (1896).

[241] Walradt v. Phœnix Ins. Co., 136 N. Y. 375, 32 N. E. 1063, 32 Am. St. 752 (1893).

as that term is generally understood; when he contracts a debt or incurs an obligation this, in a broad sense, may affect such interest, as the property constitutes the means of payment; and his pecuniary condition, in a general sense, depends upon what he has left after the discharge of all his debts and obligations. The debt assumes another form by the recovery of a judgment, and the execution is a process which, when delivered to an officer, clothes him with authority to enforce the collection of the debt. That is the foundation of all the subsequent steps. While each event in the progress of the proceedings for collection may bring the debtor and creditor into closer relations and press nearer upon the property of the debtor, yet his title or interest in the property is not divested or transferred until the sale is made which operates in law to transfer his interest to another. By the delivery of the execution and levy thereunder the officer has simply obtained authority at some future time and in the mode prescribed by law to expose the property of the debtor for sale, and that is the final act which changes the title and interest of the debtor. An officer has, no doubt, in law and from the necessities of the case, a sufficient interest in the property levied upon to enable him to protect it by insurance or against the acts of wrongdoers, otherwise the proceedings for the collection of the debt may be defeated, but still the owner retains the title in the same sense that he did after he made default in the payment of the debt, which as we have seen is the basis of every step in the process of enforcement. His interest is, no doubt, affected by the issuing of the execution and the levy, but that is also true, though perhaps in a remote sense, by contracting the debt. The words 'change of interest,' as used in the policy, are substantially synonymous with the words 'change of title,' and neither event occurs until the sale upon the execution. It may be asked what effect is, under such a construction, to be given to the word 'interest' as used in the condition. It must be borne in mind that the standard policy now in use is so framed as to contain words suitable and applicable to every subject of insurance; but all the provisions are not necessarily applicable to every case. That must always be so whenever a contract in the same form and expressed in the same language is sought to be applied to different things or classes of property. The subject of the insurance, its condition and situation, and the surrounding circumstances, may vary so as to render words and phrases contained in the policy not strictly applicable. There is a large class of risks, however, to which the word 'interest,' as used

in the condition under consideration, is no doubt applicable. Policies are frequently written in favor of parties who have a claim on the property in the nature of a lien, to secure payment of a debt and, perhaps, for other purposes."

Where the policy provided that it should be rendered void by the "levying of an execution," it was held that the mere issuance of an execution and the advertisement of the property for sale by the sheriff, was not a violation of the provision.[242] This provision is limited to acts of omission or commission by the insured, or to a change of possession by process under his order or control.[243]

Where the policy contained a condition that it should be void "if any change takes place in the title or possession of the property, except in case of succession by reason of the death of the insured, whether by sale, transfer, conveyance, legal process or judicial decree," it was held that a writ of attachment was, under the Wisconsin statute, process, and that therefore the policy was rendered invalid by the levy of the attachment on the insured property. "There can be no question," said the court, "but that the deputy sheriff took exclusive possession of the property under the writ and that a change of possession of the property took place by legal process under the language of the condition."[244]

An illegal levy, assessment, seizure and sale of the insured property do not violate this condition.[245]

§ 276. **By judgment.**—A change of title by "judgment" means change of title through judicial sale. Where the provision merely referred to a change of title, ownership or possession of the property, it was not broken by a sale under execution where, before the time for redemption had expired, the husband of the insured paid the money to redeem the property under an agreement that the purchaser would convey to him, and the property was destroyed before the conveyance was actually made. It appeared that the insured remained in undisputed possession until the loss, and never agreed that the property should be conveyed.[246] There is no change of title until

[242] Caraher v. Royal Ins. Co., 63 Hun (N. Y.) 82 (1892).

[243] Carey v. German, etc., Ins. Co., 84 Wis. 80, 54 N. W. 18, 36 Am. St. 907, 20 L. R. A. 267 (1893).

[244] Carey v. German, etc., Ins. Co., 84 Wis. 80, 54 N. W. 18, 36 Am. St. 907, 20 L. R. A. 267 (1893).

[245] Runkle v. Citizens' Ins. Co., 6 Fed. 143 (1881).

[246] Lodge v. Capital Ins. Co., 91 Iowa 103, 58 N. W. 1089 (1894).

the period of redemption expires.[247] So, a sale by the sheriff does not pass title until his deed is acknowledged and delivered.[248]

§ 277. **By partition.**—The condition prohibiting a change in the interest, title or possession of the property is broken by the setting aside of the insured property to the widow of the insured in partition proceedings after his death. The partition of the property, whether it is *inter se* or by judgment or decree, effects "a change in the interest, title or possession of the property."[249]

§ 278. **Assignment and bankruptcy proceedings.**—A general assignment of the property of the insured for the benefit of his creditors violates the clause which provides that the policy shall be void, "if the property or any interest therein be sold or transferred."[250] This is true under a policy which provides that "when any property insured by this company shall be taken possession of by a mortgagee, or in any way be alienated, the policy shall be void."[251] A condition against alienation is broken by a transfer of the property by the wife of the insured, who held the title as security for a debt to the husband's assignee in insolvency.[252] It was held in Kentucky that a transfer of goods to an assignee in trust to pay the creditors of the insured, the insured remaining in actual possession, did not violate the clause prohibiting a "transfer of the interest of the insured by sale or otherwise," without the consent of the company.[253] So, an assignment for the benefit of creditors by one member of a firm does not affect the

[247] Wood v. American F. Ins. Co., 149 N. Y. 382, 44 N. E. 80, 52 Am. St. 733 (1894).

[248] Collins v. London Assur. Corp., 165 Pa. St. 298, 30 Atl. 924 (1895).

[249] Trabue v. Dwelling House Ins. Co., 121 Mo. 75, 25 S. W. 848, 23 L. R. A. 719 (1894). See, also, Sherwood v. Agricultural Ins. Co., 73 N. Y. 447, 29 Am. Rep. 180 (1878); Burbank v. Rockingham, etc., Ins. Co., 24 N. H. 550, 57 Am. Dec. 300 (1852); Barnes v. Union, etc., Ins. Co., 51 Me. 110, 81 Am. Dec. 562 (1863); Finley v. Lycoming, etc., Ins. Co., 30 Pa. St. 311, 72 Am. Dec. 705 (1858).

[250] Ohio, etc., Ins. Co. v. Waters (Ohio), 61 N. E. 711 (1901); Orr v. Hanover F. Ins. Co., 158 Ill. 149, 41 N. E. 854 (1895). See also, Small v. Westchester F. Ins. Co., 51 Fed. 789 (1892); Campbell v. German Ins. Co. (Tex. Civ. App.), 31 S. W. 310 (1895).

[251] Young v. Eagle F. Ins. Co., 14 Gray (Mass.) 150, 74 Am. Dec. 673 (1860).

[252] Brown v. Cotton, etc., Ins. Co., 156 Mass. 587, 31 N. E. 691 (1892).

[253] Phœnix Ins. Co. v. Lawrence, 4 Metc. (Ky.) 9, 81 Am. Dec. 521 (1862).

sole and undivided ownership by the firm of the partnership property.[254] A similar provision to that in the standard policy is violated by a transfer by a registrar under and in pursuance of the bankruptcy act.[255]

§ 279. **Transfer by death.**—The clause in the New York form of policy refers to any change in the title "other than by the death of the insured." By the weight of authority, even in the absence of this exception, a general provision forbidding a transfer of the property will be construed as referring to a voluntary transfer, and not to a transfer as a result of the death of the insured.[256] Such cases distinguish between alienation and devolution, one being the act of the party and the other the act of the law. But some decisions hold that under the language of the policy there under consideration the passing of the title by devolution upon the death of the insured terminates the policy.[257] This was the effect where the prohibition was against "a change of title."[258] Where, after the death of the insured, his wife rents the premises to tenants without the consent of the company, the provision forbidding a change of occupancy and possession is violated.[259]

§ 280. **Change of possession.**—The prohibition against a change of possession does not apply where the property is insured for the joint benefit of partners, and is transferred from one partner to another.[260] There is no change of possession within the meaning of this provision where the insured enters into an oral contract to lease the property and the intended lessee enters into actual possession under a

[254] Wood v. American F. Ins. Co., 149 N. Y. 382, 44 N. E. 80 (1897).

[255] Perry v. Lorillard Ins. Co., 61 N. Y. 214, 19 Am. Rep. 272 (1874); Adams v. Rockingham, etc., Ins. Co., 29 Me. 292 (1849).

[256] Pfister v. Gerwig, 122 Ind. 567, 23 N. E. 1041 (1890); Richardson v. German Ins. Co., 89 Ky. 571, 13 S. W. 1, 8 L. R. A. 800 (1890); Burbank v. Rockingham, etc., Ins. Co., 24 N. H. 550, 57 Am. Dec. 300 (1852); Georgia Home Ins. Co. v. Kinnier, 28 Gratt. (Va.) 88 (1877); Forest City Ins. Co. v. Hardesty, 182 Ill. 39, 55 N. E. 139, 74 Am. St. 161 (1899); Planters', etc., Ins. Ass'n v. Dewberry (Ark.), 62 S. W. 1047 (1901).

[257] Sherwood v. Agricultural Ins. Co., 73 N. Y. 447, 29 Am. Rep. 180 (1878).

[258] Miller v. German Ins. Co., 54 Ill. App. 53 (1894).

[259] Planters', etc., Ins. Ass'n v. Dewberry (Ark.), 62 S. W. 1047 (1901).

[260] Allemania F. Ins. Co. v. Peck, 133 Ill. 220, 24 N. E. 538 (1890). But see cases cited at § 273, *supra*.

parol license from the insured for the mere purpose of making repairs.[261] Leaving the property in charge of a person as agent of the owner is not a change of the possession of the property.[262] Nor is there a change of possession under a policy which is payable to a chattel mortgagee, where he takes possession on default by the mortgagor.[263] But the execution of a lease, where the lessee goes into possession, is a violation of the condition against a change of possession.[264]

A policy was issued upon cotton "owned by the insured or held by it in trust or on commission." The insured gave its receipts to the owners and thereafter the receipts were transferred to certain railroad companies, which received bills of lading therefor from the insured. It was held that this did not effect a change of possession.[265]

§ 281. **Lease of the property.**—The leasing of the insured property does not violate a condition that the policy shall be void if the property be sold or transferred, or any change take place in the title or possession, "whether by legal process, judicial decree, voluntary transfer or conveyance.[266] Of course, a lease with the privilege of purchase at any time during the term does not violate the provision where the privilege is not exercised.[267]

IX. Assignment.

*This entire policy shall be void * * * if this policy be assigned before a loss.*[268]

[261] Alkan v. New Hampshire Ins. Co., 53 Wis. 136, 10 N. W. 91 (1881).

[262] Shearman v. Niagara F. Ins. Co., 46 N. Y. 526 (1871).

[263] Getman v. Guardian F. Ins. Co., 46 Ill. App. 489 (1892).

[264] Wenzel v. Commercial Ins. Co., 67 Cal. 438, 7 Pac. 817 (1885); Smith v. Phenix Ins. Co. (Cal.), 23 Pac. 383 (1890). See Fire Ass'n v. Flournoy, 84 Tex. 632, 19 S. W. 793, 31 Am. St. 89 (1892).

[265] California Ins. Co. v. Union Compress Co., 133 U. S. 387 (1890).

[266] Rumsey v. Phœnix Ins. Co., 1 Fed. 396 (1880).

[267] Planters', etc., Ins. Co. v. Rowland, 66 Md. 236, 7 Atl. 257 (1886).

[268] This provision is found in the standard policies of New York, New Jersey, Connecticut, Rhode Island, Wisconsin, Louisiana, North Dakota, South Dakota, Michigan, North Carolina, Iowa, Massachusetts, Minnesota and Maine. The New Hampshire policy provides that the policy shall be "void and inoperative during the continuance or existence of the acts or conditions of things stipulated against as follows: * * * or if, without such assent, the said property shall be sold, or this policy assigned."

§ 282. **Assignment of policy.**—This form prohibits an assignment of the policy before loss. The provision is reasonable and valid,[269] and is not an unlawful restraint upon the right to transfer property.[270]

Fire insurance contracts are personal in their nature, and are therefore not assignable without the consent of the insurer.[271] A transfer of the insured property does not of itself effect an assignment of the policy.[272] The clause does not apply to a deposit by way of pledge which gives a creditor a lien upon the proceeds.[273] An equitable assignment of the insured's interest in the policy will not defeat the insurance under this general clause.[274] Where the policy is assigned with the consent of the company, and the property is transferred to the assignee, a new contract is created between such assignee and the insurance company, which is not affected by subsequent breaches of conditions of the policy by the assignor.[275] But it is otherwise where the policy is merely assigned as collateral security, as the insurance is still upon the interest of the assignor.[276] This is true where the policy is assigned with the consent of the company as collateral security to a mortgagee, and unless there is an agreement to the contrary,[277] the policy will be rendered invalid by sub-

[269] Biggs v. North Carolina, etc., Ins. Co., 88 N. C. 141 (1883); Waterhouse v. Gloucester F. Ins. Co., 69 Me. 409 (1879); Spare v. Home, etc., Ins. Co., 19 Fed. 14 (1884). See Carroll v. Boston, etc., Ins. Co., 8 Mass. 515 (1812); Stolle v. Ætna, etc., Ins. Co., 10 W. Va. 546 (1877). An assignment of a fire insurance policy must be in writing: St. Paul, etc., Ins. Co. v. Brunswick Grocery Co., 113 Ga. 786, 39 S. E. 483 (1901).

[270] Lazarus v. Commonwealth Ins. Co., 5 Pick. (Mass.) 76 (1827).

[271] Rayner v. Preston, L. R. 18 Ch. Div. 1 (1881); Simeral v. Dubuque, etc., Ins. Co., 18 Iowa 319 (1865); Jecko v. St. Louis, etc., Ins. Co., 7 Mo. App. 308 (1879); Lett v. Guardian F. Ins. Co., 125 N. Y. 82, 25 N. E. 1088 (1890).

[272] Lett v. Guardian F. Ins. Co., 125 N. Y. 82, 25 N. E. 1088 (1890).

[273] Ellis v. Kreutzinger, 27 Mo. 311, 72 Am. Dec. 270 (1858).

[274] Bergson v. Builders' Ins. Co., 38 Cal. 541 (1869); Hall v. Dorchester, etc., Ins. Co., 111 Mass. 53, 15 Am. R. 1 (1872).

[275] Fogg v. Middlesex, etc., Ins. Co., 10 Cush. (Mass.) 337 (1852); Donnell v. Donnell, 86 Me. 518, 30 Atl. 67 (1894); Bonefant v. American Ins. Co., 76 Mich. 653, 43 N. W. 682 (1889); Cummings v. Cheshire, etc., Ins. Co., 55 N. H. 457 (1875); Buckley v. Garrett, 47 Pa. St. 204 (1864); Commonwealth v. National Ins. Co., 113 Mass. 514 (1873); Ellis v. Insurance Co., 32 Fed. 646 (1887).

[276] Birdsey v. City F. Ins. Co., 26 Conn. 165 (1857); Pupke v. Resolute F. Ins. Co., 17 Wis. 378, 84 Am. Dec. 754 (1863); Reed v. Windsor, etc., Ins. Co., 54 Vt. 413 (1882).

[277] Hartford F. Ins. Co v. Williams, 63 Fed. 925 (1894).

sequent breaches of condition by the assignor.[278] Where a mortgagee to whom such an assignment is made assumes the payment of future premiums the transaction will be construed so as to protect him from the results of future breaches of conditions by the assignor.[279] But the assignee takes subject to the conditions of the policy, and if the assignor has lost his right to recover thereon by reason of a breach of condition, he can transfer nothing to the assignee.[280]

This clause does not affect the right of the insured to transfer his interest after a loss.[281] It is, then, a mere chose in action, and is assignable like any other claim, without the consent of the company, subject, of course, to such defenses as would have been available against the original insured.[282] The transfer and assignment of a claim after loss is not void as against public policy.[283] An executory contract for the sale of property does not violate the provision against sale or assignment.[284] Nor is it violated by a transfer of an interest in the insured property from one partner to another.[285] This provision does not apply to the assignment of the interest of a mortgagee to whom the policy is made payable as his interest may appear. Where this was done the court said:[286] "The object of that provision (coupled with the provision declaring the policy void if the property insured is sold) is to prevent the company becoming

[278] Illinois, etc., Ins. Co. v. Fix, 53 Ill. 151, 5 Am. Rep. 38 (1870); Tomlinson v. Monmouth, etc., Ins. Co., 47 Me. 232 (1859); Grosvenor v. Atlantic F. Ins. Co., 17 N. Y. 391 (1858).

[279] Francis v. Butler, etc., Ins. Co., 7 R. I. 159 (1862); Brannin v. Mercer, etc., Ins., 28 N. J. L. 92 (1859).

[280] Home, etc., Ins. Co. v. Hauslein, 60 Ill. 521 (1871); Eastman v. Carrol, etc., Ins. Co., 45 Me. 307 (1858); Citizens', etc., Ins. Co. v. Doll, 35 Md. 89, 6 Am. Rep. 360 (1871). In Ellis v. Council Bluffs Ins. Co., 64 Iowa 507 (1884), it was held that by consenting to an assignment the company, as against the assignee, could not defend on the ground of the fraud of the assignor in obtaining the insurance.

[281] Hall v. Dorcester, etc., Ins. Co., 111 Mass. 53 (1872); Imperial F. Ins. Co. v. Dunham, 117 Pa. St. 460 (1888).

[282] Imperial F. Ins. Co. v. Dunham, 117 Pa. St. 460 (1888); Dogge v. Northwestern, etc., Ins. Co., 49 Wis. 501 (1880).

[283] Goit v. National, etc., Ins. Co., 25 Barb. (N. Y.) 189 (1855); West Branch Ins. Co. v. Helfenstein, 40 Pa. St. 289, 80 Am. Dec. 573 (1861); Alkan v. New Hampshire Ins. Co., 53 Wis. 136 (1881).

[284] Washington, etc., Ins. Co. v. Kelly, 32 Md. 421, 3 Am. Rep. 149 (1870).

[285] Hoffman v. Ætna F. Ins. Co., 32 N. Y. 405 (1865); West v. Citizens' Ins. Co., 27 Ohio St. 1, 22 Am. Rep. 294 (1875).

[286] Whiting v. Burkhardt (Mass.), 60 N. E. 1 (1901).

the insurer of property of a person who is not acceptable to it. An insurance company has the right to refuse to insure a person whose character is such that the moral risk, to use the term employed in the insurance business, is greater than it is where the same property is owned by an honest man, and is one which they do not care to assume. The transfer prohibited by this provision is a transfer of the contract of insurance,—that is to say, a transfer by * * * the persons insured, not a transfer by J., who was the person designated as the person entitled to receive the proceeds of the insurance, if any, due under the contract between the company on the one hand and the insured on the other. * * * What J. did by assigning his 'right and interest in this policy' was not to transfer the policy, but to assign to another his right to receive the proceeds, if any, under it, the policy remaining, after this assignment, as before, the policy of G."

A policy was made payable to a mortgagee, and provided that no act or default of any person but the mortgagee, his agents or those claiming under him, should affect his right to recover in case of loss; and it was held that the assignee of such mortgagee might recover on the policy, although a part owner of the property had sold his interest therein before loss, and that the provision against assignment did not apply to an assignment by such mortgagee.[287] The assent of the company to an assignment of the policy may be given after an unauthorized assignment as well as before.[288] Where a policy which had been assigned was presented to the agent of the company for the purpose of having its consent indorsed thereon, and the agent, instead of making this indorsement, signed and attached to the policy a slip which provided that loss, if any, thereunder, should be payable to the assignee, as his interest might appear, it was held that there was a substantial consent to the assignment.[289] Where, at the instance of the insured, an entry was made in the policy register of the company, "transferred to G.," it was held sufficient to show acceptance by the company of G. instead of the original insured.[290] It has been held that an indorsement, "in case

[287] Whiting v. Burkhardt (Mass.), 60 N. E. 1 (1901).

[288] Gould v. Dwelling House Ins. Co., 134 Pa. St. 570, 19 Atl. 793, 19 Am. St. 717 (1890); Shearman v. Niagara F. Ins. Co., 46 N. Y. 526 (1871).

[289] Queen Ins. Co. v. Block (Ky), 58 S. W. 471 (1900). See, also, Southern Fertilizer Co. v. Reams, 105 N. C. 283, 11 S. E. 467 (1890); Buchanan v. Exchange F. Ins. Co., 61 N. Y. 26 (1874).

[290] Griswold v. American, etc., Ins.

of loss, pay to A.," is not an assignment of the policy.[291] Generally the insertion of a clause in the policy making the loss payable to a third party does not operate as an assignment of the policy.[292] Thus, where the policy is payable to a mortgagee as his interest may appear, there is no assignment of the policy by a mere designation of one to whom the fund, or a portion thereof, is to be paid with the company's consent. The right of action is still in the original insured.[293] A mortgagee to whom a policy is made payable as his interest may appear need not obtain the further consent of the company as upon a formal assignment of the policy.[294] An unsuccessful attempt to assign the policy where the interest in the insured property is not transferred will not render the policy void under this provision.[295] The consent to an assignment may be given by any duly authorized agent of the company.[296] No one but the company can object to an assignment of the policy.[297]

X. *Prohibited Articles.*

*This entire policy shall be void * * * if (any usage or custom of trade or manufacture to the contrary notwithstanding) there be kept, used, or allowed on the above described premises, benzine, benzole, dynamite, ether, fireworks, gasoline, greek fire, gunpowder exceeding twenty-five pounds in quantity, naphtha, nitroglycerine, or*

Co., 70 Mo. 654 (1879). See Minturn v. Manufacturers' Ins. Co., 10 Gray (Mass.) 501 (1858). As to the meaning of "indorsement" when required to be on the policy, see Pennsylvania Ins. Co. v. Bowman, 44 Pa. St. 89 (1862); Reynolds v. Atlas, etc., Ins. Co., 69 Minn. 93, 71 N. W. 831 (1897).

[291] Russ v. Waldo, etc., Ins. Co., 52 Me. 187 (1863).

[292] Martin v. Franklin F. Ins. Co., 9 Vroom (N. J.) 140 (1875); Froehly v. North St. Louis, etc., Ins. Co., 32 Mo. App. 302 (1888).

[293] Williamson v. Michigan, etc., Ins. Co., 86 Wis. 393, 39 Am. St. 906 (1893).

[294] National F. Ins. Co. v. Crane, 16 Md. 260, 77 Am. Dec. 289 (1860).

[295] Smith v. Monmouth, etc., Ins. Co., 50 Me. 96 (1863). In Bursinger v. Watertown Bank, 67 Wis. 75, 58 Am. Rep. 848 (1886), it appeared that the insured attempted to assign the policy while intoxicated.

[296] Breckinridge v. American, etc., Ins. Co., 87 Mo. 62 (1885); Imperial F. Ins. Co. v. Dunham, 117 Pa. St. 460, 12 Atl. 668 (1888). As to manner in which assent may be made, see Durar v. Hudson, etc., Ins. Co., 24 N. J. L. 171 (1853); Boynton v. Farmers', etc., Ins. Co., 43 Vt. 256, 5 Am. Rep. 276 (1870); Grant v. Eliot, etc., Ins. Co., 75 Me. 196 (1883).

[297] Leinkauf v. Calman, 110 N. Y. 50 (1888).

other explosives, phosphorus, or petroleum or any of its products of greater inflammability than kerosene oil of the United States standard (which last may be used for lights and kept for sale according to law, but in quantities not exceeding five barrels, provided it be drawn and lamps filled by daylight or at a distance not less than ten feet from artificial light) [298]

§ 283. **Use of property—Prohibited articles.**—This section contains a proper restriction upon the use of the property, and must be observed by the insured.[299] The language, "any use or custom of trade or manufacture to the contrary" was inserted in the standard form for the purpose of avoiding the rule of construction which permits the use of the articles named in the printed slip, where they constitute an ordinary part of the stock of goods described in the policy or are necessary and commonly used as incident to the business. But the rule still prevails, and the only effect of the clause is "to impose on the insured the burden of showing with perhaps greater clearness that the written description clearly covers the prohibited articles in question."[300]

Operating a laundry is not a trade or manufacture within this

[298] This clause is found in the standard policies in use in the states of New York, New Jersey, Connecticut, Rhode Island, Louisiana, North Dakota, South Dakota, Michigan, North Carolina, and Iowa. Wisconsin substitutes the words "Wisconsin standard" for "United States standard" in referring to kerosene oil. Massachusetts, Maine and Minnesota have the following clause in their standard policies: "Or if gunpowder or other articles subject to legal restrictions shall be kept in quantities or manner different from those allowed or prescribed by law, or if camphine, benzine, naphtha or other chemical oils or burning fluids shall be kept or used by the insured on the premises insured, except that what is known as refined petroleum, kerosene or coal oil, may be used for lighting, and in dwelling houses kerosene oil stoves may be used for domestic purposes to be filled when cold by daylight, and with oil of lawful test only." The New Hampshire clause makes no reference to the use of kerosene oil stoves for domestic purposes, otherwise it is the same as the preceding clause.

[299] United, etc., Ins. Co. v. Foote, 22 Ohio St. 340, 10 Am. Rep. 735 (1872); Liverpool, etc., Ins. Co. v. Gunther, 116 U. S. 113 (1885). In Yoch v. Home, etc., Ins. Co., 111 Cal. 503, 44 Pac. 189 (1896), it was held that "an agreement indorsed" permitting otherwise prohibited articles to be kept on the insured premises is made where the articles are included in the written description of the insured property.

[300] Richards Ins., § 149; Birmingham F. Ins. Co. v. Kroegher, 83 Pa. St. 64, 24 Am. Rep. 147 (1876).

clause so as to preclude proof of a custom of using gasoline by the residents of a community at the time the policy was issued.[301] The general rule of construction is that the written part of a contract will prevail over what is printed; and therefore, where the writing describes a certain kind or stock of goods or property used in a certain business it is presumed that the intention was to insure all that is commonly carried in such a stock, and to permit the property to be used in the ordinary and customary way. Hence, a policy covering materials of a certain business, which contained a printed condition prohibiting the keeping or using of certain inflammable substances, is valid where the business is of such a character that the substances constitute a component part of the stock of materials used in the business. In a case where the question received full consideration it was said:[302] "The contrary doctrine would present the strange anomaly of issuing a policy of insurance containing such conditions that under no circumstances could payment of the loss thereunder be legally demanded. A rule which permitted the printed conditions to control the written statement of the subject on which the insurance was issued would place the insurance company in the peculiar position of saying in effect: 'I issue you this policy; I accept your money in satisfaction of my demands for premiums; I insure your property to be used in your business, but if you use it your policy is void.'"

Where the policy covered property described as a stock such as is usually kept in a general retail store, and the keeping of gunpowder was prohibited by the printed portions of the policy, it was held that if the gunpowder was a part of the stock usually kept in a retail store it might be kept without violating the condition of the policy.[303] So, a policy insuring a stock of hardware provided that the keeping or using or allowing of dynamite on the premises would render the policy void unless otherwise provided by agreement on the policy.

[301] Northern Assur. Co. v. Crawford (Tex. Civ. App.), 59 S. W. 916 (1900).

[302] Maril v. Connecticut F. Ins. Co., 95 Ga. 604, 51 Am. St. 102 (1895). In this case the learned judge suggests that the doctrine asserted by the insurance company is well illustrated by the poetical advice offered by an indulgent but apprehensive matron to her daughter:

"'Mother, may I go out to swim?'
'Yes, my darling daughter;
Hang your clothes on a hickory limb,
But don't go near the water.'"

[303] Peoria, etc., Ins. Co. v. Hall, 12 Mich. 202 (1864); Pindar v. Kings, etc., Ins. Co., 36 N. Y. 648 (1867).

An attached slip provided that the insurance should cover merchandise usually kept for sale in a hardware store, and it was held that the policy covered dynamite when it was shown that it was usual to keep dynamite in such stores.[304]

So, where the policy covered a stock of goods such as is usually kept in country stores, and contained a printed condition that it should be void if certain articles, including gasoline, were kept, used, or allowed on the premises, it was held valid, where gasoline was kept as a part of the usual stock of merchandise. After discussing the various rules, the court said: "Applying these rules to the contract in the present case, it must be held that it was the intention of the defendant to insure gasoline if it was an article usually kept in country stores, and that if such was its intention, it was no violation of the policy that the insured did keep gasoline on the premises as a part of the stock of merchandise."[305]

Benzine kept in small quantities as part of a stock of drugs and chemicals does not avoid a policy on such stock, although there is a stipulation against the keeping of benzine in the store. "The court will not presume that the parties intended to make such an absolute agreement, but in such cases will presume that the intention was that the printed portions of the policy forbidding the keeping of benzine should not apply to the keeping of it bottled in small quantities, as customary with druggists, but only to storing and keeping it in large quantities."[306]

An insurance company must be presumed to be familiar with the materials necessary to carry on a trade or business and to know what is commonly included in a stock of goods such as that insured, and in issuing the policy it must be deemed to have intended to include all such materials in the risk.[307] Hence, where the policy was issued upon the materials used in the business of photography, it was held to cover all such articles, such as kerosene, as were in common use, although some other things might have been substituted therefor.[308] A policy upon a stock of fancy goods, toys and other articles used

[304] Phenix Ins. Co. v. Walters, 24 Ind. App. 87, 56 N. E. 257 (1900), citing many cases.

[305] Yoch v. Home, etc., Ins. Co., 111 Cal. 503, 34 L. R. A. 857 (1896).

[306] Phœnix Ins. Co. v. Flemming, 65 Ark. 54, 39 L. R. A. 789 (1898).

[307] Lancaster F. Ins. Co. v. Lenheim, 89 Pa. St. 497, 33 Am. Rep. 778 (1879), annotated.

[308] Hall v. Insurance Co., 58 N. Y. 292, 17 Am. Rep. 255 (1874); American, etc., Ins. Co. v. Green, 16 Tex. Civ. App. 531, 41 S. W. 74 (1897).

in the business of the defendant as a German jobber and importer, with the privilege of keeping fireworks, which contained a provision requiring hazardous articles, such as fireworks, if kept, to be specially written in the policy, is avoided by the storing of fireworks on the premises without such permission. Where a dealer was permitted to keep firecrackers, it was held not to include fireworks; nor were they within the phrase, "other articles in his line of business," in view of the express provisions of the policy.[309]

The use of an inflammable substance, which is a necessary, usual and customary incident to the business in which the insured property is used, will be held to have been within the contemplation of the parties at the time of issuing the policy.[310] Where the printed conditions exempt the insurer from liability for loss occasioned by the use of camphine, and there was a written provision granting the privilege for a printing office, bindery, bookstore and steam boiler in the yard, it was held that the use of camphine as one of the necessary articles for use in a printing office did not invalidate the policy.[311]

The provision will be given a liberal construction where the prohibited articles are used incidentally and for temporary purposes only, such as for cleaning machinery.[312] It is not broken by the keeping in a store of a jug containing crude petroleum, which is used by the insured for medicinal purposes, if the risk is not thereby increased, and this is a question for the jury.[313] Gasoline is not kept, used, or allowed on the premises within the meaning of the policy by leaving a five-gallon can containing gasoline in a building for a number of days for use in burning off paint preparatory to painting the building. The prohibition refers to the habitual keeping, using or allowing of any of these articles on the premises, and not to the casual introduction of the articles for some temporary purpose connected with their occupation.[314] So, there is no breach of the condi-

[309] Steinbach v. Relief F. Ins. Co., 13 Wall. (U. S.) 183 (1871). In Steinbach v. Lafayette F. Ins. Co., 54 N. Y. 90 (1873), upon the same facts, it was held that if, as a matter of fact, the keeping of fireworks was in the plaintiff's line of business, they were embraced in the description of the property covered by the policy.

[310] Maril v. Connecticut F. Ins. Co., 95 Ga. 604, 30 L. R. A. 835 (1894).

[311] Harper v. New York, etc., Ins. Co., 22 N. Y. 441 (1860).

[312] Wheeler v. Traders' Ins. Co., 62 N. H. 450, 13 Am. St. 582 (1883), note.

[313] Williams v. People's F. Ins. Co., 57 N. Y. 274 (1874).

[314] Smith v. German Ins. Co., 107 Mich. 270, 30 L. R. A. 368 (1895). *Contra*, see First Cong. Church v. Holyoke, etc., Ins. Co., 158 Mass. 475, 33 N. E. 572, 35 Am. St. 508, 19 L. R.

tion where the policy prohibits the use of camphine, spirit gas, burning fluid, or chemical oils, but permits the use of refined coal oil, kerosene or other carbon oils for lights, if drawn and the lamps filled by daylight, and the insured uses lard oil and candles for lights and filled the lamps at night.[315]

§ 284. **Prohibited articles, continued.**—A much narrower rule of construction than that stated in the preceding section is adopted in some states. Thus, in New Hampshire, a violation of the provision against the keeping and use of benzine and other enumerated articles of similar character was held to render the policy void. The court said: "Cases in which a disregard of the prohibition of the keeping or using of extraordinarily hazardous articles has not been held to work a forfeiture of the policy, are those where the use made was one incident to the business of the insured, adopted from necessity or custom, and recognized by the insurer so that a waiver of the prohibitory clause followed." In reference to the claim that the provision was not violated because the use was merely temporary, the court said: "The cases relied on as authority for this position are cases for the most part where there was no express stipulation or warranty against the use of the particular dangerous article or material in question, but only a provision in general terms against the keeping of hazardous things on the premises, or of carrying on a different or more dangerous trade. But where there is a stipulation that the policy shall be avoided on the use of the article expressly named, and there is nothing in the policy from which permission to use the article in a limited, partial or temporary way can be inferred, full effect is usually given to the prohibitive clause by a forfeiture of the policy for its violation."[316]

So, in Pennsylvania, under a policy which provided that it should be void if the hazard be increased by any means within the control or knowledge of the insured, or if there be kept, used or allowed on the premises fireworks or other named explosives, it was held that the temporary storing of an assorted lot of fireworks upon the premises

A. 587 (1893), where it was held that the policy was avoided by the use of a naphtha torch for burning off old paint on the building.

[315] Carlin v. Western Assur. Co., 57 Md. 515, 40 Am. Rep. 440 (1881). Compare Wheeler v. Traders' Ins. Co., 62 N. H. 450, 13 Am. St. 582 (1883).

[316] Wheeler v. Traders' Ins. Co., 62 N. H. 450, Woodruff Ins. Cas. 162 (1883).

for celebration purposes, with the knowledge and consent of the insured, was a breach of the condition and prevented a recovery for loss arising from the accidental explosion of such fireworks. The court said: "We have never gone to the length that other courts have in construing away express provisions or stipulations as to forfeiture. While some hold that it is permissible to use the articles prohibited by the general printed clause, provided they are such as naturally appertain to the stock of goods or property described in the written part of the policy, this court has refused to go so far."[317]

But even in Pennsylvania it has been held that where the use of the prohibited article is a necessary one in connection with the business, it must be presumed that the intent of the parties was to insure the subject of the insurance as it would continue to be during the life of the policy, notwithstanding the printed provision.[318]

§ **285. Exception in favor of kerosene oil.**—"Kerosene oil of the United States standard may be used for lights and kept for sale according to law, but in quantities not exceeding five barrels, provided that it be drawn and lamps filled by daylight at a distance not less than ten feet from artificial light."[319] The policy is not avoided by the use of kerosene oil otherwise than in lamps for illuminating purposes where the policy provides that "kerosene oil of the

[317] Heron v. Phœnix Ins. Co., 180 Pa. St. 257, 57 Am. St. 638 (1897), reviewing Pennsylvania cases. In this case fireworks were placed in the parlor of a residence on the third of July for the purpose of using them in a celebration on the evening of the fourth, and the policy contained a clause that it should be void if fireworks or other such articles "were kept, used, or allowed on the premises, any usage or custom of trade or manufacture to the contrary notwithstanding."

[318] Fraim v. National F. Ins. Co., 170 Pa. St. 151, 50 Am. St. 753 (1895).

[319] This provision is found in the standard policies in use in the states of New York, New Jersey, Connecticut, Rhode Island, Louisiana, North Dakota, South Dakota, Michigan, North Carolina, and Iowa. Wisconsin substitutes the words "Wisconsin standard" for "United States standard." The standard policies of Massachusetts, Minnesota and Maine provide that: "Kerosene or coal oil may be used for lighting, and in dwelling houses oil stoves may be used for domestic purposes, to be filled when cold by daylight, and with oil of lawful test only." The New Hampshire policy makes no reference to the use of kerosene for domestic purposes; otherwise it is the same as the Massachusetts, Minnesota and Maine policies.

legal standard may be used for lights only, provided the oil be drawn and the lamps filled and trimmed solely by daylight," as this restriction is merely a regulation of the use of kerosene when used for lighting purposes, and will not be construed to prohibit its use for any other purpose than for lights.[320]

XI. Vacancy.

*This entire policy shall be void * * * if a building herein described, whether intended for occupancy by owner or tenant, be or become vacant or unoccupied and so remain for ten days.*[321]

§ **286. In general.**—The standard form permits the insured premises to become vacant for ten days or less without notice to the insurer. The question of the effect of a temporary vacancy is thus eliminated. A vacancy beyond the prescribed period is a breach of the condition.[322] Under a general provision rendering a policy void if the insured buildings become vacant and unoccupied, it is held by the weight of authority that a mere temporary vacancy will not affect a recovery,[323] although there are authorities to the contrary. Thus,

[320] Snyder v. Dwelling House Ins. Co., 59 N. J. L. 544, 59 Am. St. 625 (1896). The New York court declined, in view of the fact that the legislature has declared certain grades and qualities of kerosene proper and safe to use, to take judicial notice of the explosive qualities of kerosene. It was incumbent on the defendant to show that the kerosene used was in fact inflammable: Wood v. North Western Ins. Co., 46 N. Y. 421 (1871). See, also, Mears v. Humboldt Ins. Co., 92 Pa. St. 1 (1879).

[321] This provision is found in the standard policies of New York, New Jersey, Connecticut, North Carolina, Rhode Island, Wisconsin, Louisiana, Michigan, North Dakota, and South Dakota. The Iowa clause reads, "or if a building herein described, whether intended for occupancy by the owner or tenant, be or become vacant or unoccupied, or if the premium be not paid when due." The standard policies of Massachusetts, Minnesota, Maine, and New Hampshire read, "or if the premises hereby insured shall become vacant by the removal of the owner or occupant, and so remain vacant for more than thirty days without permission in writing indorsed hereon."

[322] Thompson v. Caledonia F. Ins. Co., 92 Wis. 664, 66 N. W. 801 (1896); Burner v. German, etc., Ins. Co., 20 Ky. L. 71, 45 S. W. 109 (1898). As to statutory provision that vacancy will avoid the policy only when there is an increase of risk, see Moody v. Amazon Ins. Co., 52 Ohio St. 12, 38 N. E. 1011, 26 L. R. A. 313, 49 Am. St. 699 (1894).

[323] Liverpool, etc., Ins. Co. v. Buckstaff, 38 Neb. 146, 41 Am. St. 725 (1893); Johnson v. Norwalk F. Ins. Co., 175 Mass. 529, 56 N. E. 569 (1900).

in Texas it is held that where the policy provides that if the buildings become vacant and unoccupied without the consent of the company indorsed upon the policy, it shall be null and void, it is invalidated by a temporary vacancy of the property, although without the knowledge of the owner, and a subsequent re-occupancy does not revive the policy unless the forfeiture has been waived by the insurer.[324] It has been held that a reasonable time elapsing between a change of tenants does not render the policy void under this clause.[325] Vacancy of the house alone does not avoid the policy where it prohibits vacancy of the premises and covers both a house and a barn.[326]

§ 287. **Construction.**—This condition against a building becoming vacant or unoccupied must be construed in the light of the situation and character of the property and the ordinary incidents and contingencies affecting the use to which it and other property of similar character in the same use is subject.[327] In construing the provision the Supreme Court of Wisconsin said:[328] "Under certain circumstances premises may be vacant or unoccupied when under other circumstances premises in like situation may not be so within the meaning of that term in insurance policies. Thus, if one insures his dwelling house described in the policy as occupied by himself as his residence, and moves out of it, leaving no person in occupation thereof, it thereby becomes 'vacant or unoccupied.' But if he insures it as a tenement house or as occupied by a tenant it may fairly be presumed, nothing appearing to the contrary, that the parties to

[324] East Texas F. Ins. Co. v. Kempner, 87 Tex. 229, 47 Am. St. 99 (1894). *Contra*, Ætna Ins. Co. v. Meyers, 63 Ind. 238 (1878).

[325] Worley v. State Ins. Co., 91 Iowa 150, 51 Am. St. 334 (1894).

[326] Worley v. State Ins. Co., 91 Iowa 150, 51 Am. St. 334 (1894), commenting on Connecticut F. Ins. Co. v. Tilley, 88 Va. 1024, 29 Am. St. 770 (1892).

[327] Limburg v. German F. Ins. Co., 90 Iowa 709, 48 Am. St. 468 (1894); Continental Ins. Co. v. Kyle, 124 Ind. 132, 19 Am. St. 77, and note (1890); Whitney v. Black River Ins. Co., 72 N. Y. 117, 28 Am. Rep. 116, and note (1878); Carr v. Williams' Ins. Co., 60 N. H. 513 (1881).

[328] Hotchkiss v. Phœnix Ins. Co., 76 Wis. 269, 20 Am. St. 69 (1890). To the same effect, see Lockwood v. Middlesex, etc., Assur. Co., 47 Conn. 553 (1880); Traders', etc., Ins. Co. v. Race, 142 Ill. 338 (1892); Home Ins. Co. v. Wood, 47 Kan. 521 (1891); Doud v. Citizens' Ins. Co., 141 Pa. St. 47, 23 Am. St. 263 (1891); Roe v. Dwelling House Ins. Co., 149 Pa. St. 94, 34 Am. St. 595 (1892); City Planing, etc., Co. v. Merchants', etc., Ins. Co., 72 Mich. 654, 16 Am. St. 552 (1888); Cummins v. Agricultural Ins. Co., 67 N. Y. 260, 23 Am. Rep. 111 (1876).

the contract of insurance contemplated that the tenant was liable to leave the premises and that more or less time might elapse before the owner could procure another tenant to occupy it, and hence that the parties did not understand that the house should be considered vacant and the policy forfeited or suspended (according to its terms) immediately upon the tenant's leaving it." The condition against non-occupancy must therefore be construed and applied with reference to the subject-matter of the contract, and the ordinary incidents attending the use of such property.[329]

§ 288. **Vacant and unoccupied not synonymous.**—The word "vacant" does not necessarily mean the same thing as "unoccupied." In the New York standard form of policy the words are connected by the conjunction "or," and it follows that a breach of either condition invalidates the policy. It would seem, however, that unoccupied in this sense must be intended to guard against the same condition as the word vacant. Where it is evident from the connection that the words are used to protect the company against the extra risk involved in the absence of persons from the premises, they should be construed as if they meant the same thing. Thus, it was held in New Hampshire that a house from which the insured had removed was both vacant and unoccupied, although certain articles of furniture remained in the house.[330] Where the condition was that the policy should be void if the house become vacant *and* unoccupied, it was held that there was no breach unless the building was both empty and unused as a place of abode. The buildings must not only be unoccupied, but also vacant, and a dwelling house furnished throughout, from which the owner had removed for the season, intending to return and resume possession, was not vacant. It appeared that the defendant issued a policy containing this condition on the plaintiff's summer residence, from which he removed in November, leaving it furnished and in charge of a person living near, and intending to return again the following spring. The court said: "A dwelling house is unoccupied when no one lives therein, but is not then necessarily

[329] Halpin v. Phenix Ins. Co., 118 N. Y. 165 (1890). To the same effect, see Albion Lead Works v. Williamsburg, etc., Ins. Co., 2 Fed. 479 (1880); Keith v. Quincy, etc., Ins. Co., 10 Allen (Mass.) 228 (1865); Ashworth v. Builders', etc., Ins. Co., 112 Mass. 422 (1873).

[330] Moore v. Phœnix Ins. Co., 62 N. H. 240, 10 Am. St. 384 (1882), annotated.

vacant. A house filled with furniture throughout can not be said to be vacant, the primary and ordinary meaning of which is empty. To avoid the policy the premises must not only be unoccupied, but also vacant. Force should be given to both words."[331] The same court in a subsequent case recognized the fact that the words may have different meanings, and said:[332] "The plaintiff contends that the two words, 'vacant' and 'unoccupied,' are synonyms and are to be interpreted as having the same meaning, and that meaning is empty, and then argues that as the dwelling house was not empty there was no breach of condition. There are doubtless conditions of a dwelling house, or other like structure, when either word applied to it, or both words applied to it, will express a like state of it. There are, however, states of it when that will not be the case. It is so because the different things which are receptive of the epithets of vacant and unoccupied are different in their capability and susceptibility of being filled or occupied. Some can not have one of those terms applicable to them without the other at the same time being also applicable. * * * And it is because, in our experience of the purpose and use of a dwelling house, we have come to associate our notion of the occupation of it with the habitual presence and continued abode of human beings within it, that the word applied to a dwelling always raises that conception in the mind. Sometimes, indeed, the use of the word 'vacant,' as applied to a dwelling, carries the notion that there is no dweller therein, and we would not be sure always to get or convey the idea of an empty house by the words 'vacant dwelling' applied to it. But when the phrase 'vacant or unoccupied' is applied to a dwelling house, plainly there is a purpose—an attempt to give a different statement of the condition thereof; by the first word as an empty house, by the second word as one in which there is not habitually the presence of human beings. * * * The term 'unoccupied,' used in the policy, is entitled to a sense adapted to the occasion of its use and the subject-matter to which it is applied."

§ 289. **Construction when applied to dwelling house.**—When the insurance is upon a dwelling house the condition must be construed in the light of the ordinary use of such premises. The evi-

[331] Herrman v. Merchants' Ins. Co., 81 N. Y. 184, 37 Am. Rep. 488 (1880).

[332] Herrman v. Adriatic F. Ins. Co., 85 N. Y. 162, Woodruff Ins. Cas. 165 (1881).

dent intent of the insurer is that the house shall be used as a place of abode for human beings,[333] and when this is not the case there is added a risk which is not assumed under the contract. A dwelling house should therefore be deemed vacant and unoccupied when it is no longer used as a place of abode.[334] Hence, the casual sleeping in a house does not constitute occupany of it. A policy was held invalidated where it appeared that the insured moved his family to another building, taking all the furniture except a few beds and trifling household articles, trunks containing clothing and some provisions in the pantry, and that the only occupation of the house was by laborers in the employment of the insured, sleeping therein part of the time, and his wife going there every day to get provisions.[335] The occupation of a dwelling house as a mere storehouse is not a compliance with this condition.[336] Where a tenant removed a week before the fire, and the furniture was all stored in one of the rooms for the purpose of being removed, and no one had slept in the house for more than a month, the house was held to be "vacant, unoccupied or uninhabited," although a person went there occasionally to see if the goods were all right.[337] But to constitute occupancy of a dwelling house it need not be used continuously. The family may be absent for health, business or convenience for reasonable periods. A dwelling is not vacant within this provision, although it has ceased to be used as the family residence, if household goods remain in it ready

[333] Weidert v. State Ins. Co., 19 Ore. 261, 20 Am. St. 809, and note (1890); Bonefant v. American F. Ins. Co., 76 Mich. 653, 43 N. W. 682 (1889). See note in Moore v. Phœnix Ins. Co., 10 Am. St. 392 (1886).

[334] North American F. Ins. Co. v. Zaenger, 63 Ill. 464 (1872); American Ins. Co. v. Padfield, 78 Ill. 167 (1875); Fitzgerald v. Connecticut F. Ins. Co., 64 Wis. 463 (1885); Alston v. Old North, etc., Ins. Co., 80 N. C. 326 (1879); Agricultural Ins. Co. v. Hamilton, 82 Md. 88, 51 Am. St. 457 (1895).

[335] Agricultural Ins. Co. v. Hamilton, 82 Md. 88, 51 Am. St. 457 (1895).

[336] Halpin v. Ætna F. Ins. Co., 120 N.Y. 70 (1890); Limburg v. German F. Ins. Co., 90 Iowa 709, 48 Am. St. 468 (1894), reviewing many cases; Agricultural Ins. Co. v. Hamilton, 82 Md. 88, 51 Am. St. 457 (1895). A house is unoccupied when no one is living in it: Cook v. Continental Ins. Co., 70 Mo. 610, 35 Am. Rep. 438 (1879); Herrman v. Adriatic F. Ins. Co., 85 N. Y. 162, 39 Am. Rep. 644 (1881); Stoltenberg v. Continental Ins. Co., 106 Iowa 565, 68 Am. St. 323 (1898).

[337] Home Ins. Co. v. Boyd, 19 Ind. App. 173, 49 N. E. 285 (1898).

to be used and it continues to be occupied by one or more members of the family or a tenant having access to the entire building for the purpose of caring for it, and it is cared for and some use made of it as a place of abode.[338] So, a policy is not invalidated where it appears that the occupant and his wife absented themselves from the house for a considerable period, but for a temporary and special purpose, and retained it as a residence, intending to return to it, leaving his family clothing there, and his wife going once a week to the house for the purpose of caring for and cleansing it, and from time to time for other purposes.[339]

Where the policy covered the house and barn the court said: "Occupancy, as applied to such buildings, implies the actual use of the house as a dwelling house, and such use of the barn as is ordinarily incident to a barn belonging to an occupied house, or at least more than the use of it for mere storage. The insurer had the right by the terms of the policy to the care and supervision which is involved in such occupancy."[340]

§ **290. Building—Contents—Vacancy.**—The insurance upon a building may be invalidated by reason of a breach of this condition without affecting the insurance upon the personal property in the building. A manufacturing establishment is an establishment for the manufacture of raw material, and the idea excludes the material upon which it operates. "The same form of policy is prescribed for insurance upon all kinds of property, and general provisions would naturally be inserted which are applicable to some kinds of property and not to other kinds. The provision in regard to the removal of the property insured is evidently intended for movable property; the provision in regard to the premises being vacant by the removal of the owner or occupant, and the provision in regard to dangerous materials being kept or used upon the premises, evidently relate only to buildings insured. There is more reason for holding that those provisions apply to furniture, and that an insurance on furniture or any personal property in a house would be made void by the vacancy of the house or by the keeping in it of the dangerous articles mentioned, than that the insurance upon a stock in a manufacturing es-

[338] Moody v. Amazon Ins. Co., 52 Ohio St. 12, 49 Am. St. 699 (1894).

[339] Cummins v. Agricultural Ins. Co., 67 N. Y. 260 (1876).

[340] Ashworth v. Builders', etc., Ins. Co., 112 Mass. 422, 17 Am. Rep. 117 (1873).

tablishment would be made void if the factory should cease operation. All these provisions have full meaning and effect when applied, according to their terms, to an insurance of property to which they can be applied. To extend them to an insurance of property to which they do not apply, because the destruction of such property not insured may cause the destruction of property insured, is against all rules of construction and seems to be a plain interpolation of what is not in the contract. The building, and the machinery, fixtures and appliances, constitute the manufacturing establishment. It is going far enough to hold that in one insurance of machinery the premises insured are a manufacturing establishment of which the machinery constitutes a part."[341]

§ 291. Illustrations of construction of this provision.—A building is unoccupied where a tenant who occupies the same as a store abandons it before the end of the term and leaves therein only a small amount of merchandise of a nominal value, although he retains the key to the building at the request of the insured.[342] So, a dwelling or tenement house is vacant and unoccupied if the occupant has left it, although some trifling articles of furniture of little value are left in one of the rooms.[343] The fact that a tenant intending to remove goes away to meet his wife, leaving two of his children in the house, with instructions to remain there until he returned, and that a small portion of the furniture has been removed, does not constitute a breach of this condition.[344] A building was not occupied by a tenant as a dwelling house where the tenant had moved out and the son of the owner slept in the house during the day and worked nights, having only a cot, chair and alarm clock in the house, and the family of the owner resided next door and obtained water from a cistern in the kitchen of this house, and the owner went through the house every day.[345] The fact that a tenant and his servants had for two days before the fire been cleaning the house preparatory to its occupation does not constitute occupation.[346] So, a house was not occupied al-

[341] Stone v. Howard Ins. Co., 153 Mass. 475, 27 N. E. 6 (1891).

[342] Home Ins. Co. v. Scales, 71 Miss. 975, 42 Am. St. 512 (1894).

[343] Schuermann v. Dwelling House Ins. Co., 161 Ill. 437, 52 Am. St. 377 (1896).

[344] Burlington Ins. Co. v. Lowery, 61 Ark. 108, 54 Am. St. 196 (1895).

[345] Eureka, etc., Ins. Co. v. Baldwin, 62 Ohio St. 368, 57 N. E. 57 (1900).

[346] Thomas v. Hartford F. Ins. Co., 21 Ky. L. 914, 53 S. W. 297, rehearing denied (1899) 21 Ky. L. 1139, 56 S. W. 264.

though two workmen took their meals there and kept their trunks and clothing in the building and slept at night in one of the rooms, but were employed elsewhere during the day.[347] So, a dwelling house is unoccupied where the house remains vacant for three months and is then let to a tenant, who, up to the time of the loss, has placed therein implements for cleaning it, but not otherwise occupied the premises.[348]

A church used by a congregation in the ordinary manner that such buildings are used, and which is occasionally visited by the sexton at times when the congregation is not in session, is occupied, although there was no church meeting in the building for a period of six weeks, during which time there was no minister of the church and the congregation was awaiting the arrival of a new minister.[349] A house was not vacant where a part of the tenant's goods were in the house the night of the fire, and the tenant had retained the key to enable him to remove the same the next day, although he had already removed a part of the goods and the house was not occupied that night.[350] An ice house is not, as a matter of law, vacant and unoccupied because there is nothing therein at the time it was burned, in October, except the tools used in putting up ice and a small quantity of unmerchantable ice.[351] The premises are not vacated by a tenant leaving the premises when threatened by a forest fire in order to remove his sick wife to a place of safety, leaving several people to defend the property against fire.[352] So, occupation by one tenant is within the provision that it shall become void if the premises be occupied by tenants.[353] A house is not vacant where it appears that the occupant of the house commenced to move out at nine o'clock in the morning and intended to complete the removal of the goods in the afternoon, and the house was destroyed by fire at noon.[354] So, a building described as "a ten tenement frame block" is not unoccupied if two of the tenements are in actual use and occupancy as residences.[355] Where

[347] Poor v. Humboldt Ins. Co., 125 Mass. 274 (1878).

[348] Litch v. North British, etc., Ins. Co., 136 Mass. 491 (1884).

[349] Hampton v. Hartford F. Ins. Co., 65 N. J. L. 265, 47 Atl. 433, 52 L. R. A. 344 (1900).

[350] Norman v. Missouri, etc., Ins. Co., 74 Mo. App. 456 (1898).

[351] Des Moines Ice Co. v. Niagara F. Ins. Co., 99 Iowa 193, 68 N. W. 600 (1896).

[352] Raymond v. Farmers', etc., Ins. Co., 114 Mich. 386, 72 N. W. 254 (1897).

[353] Elliott v. Farmers' Ins. Co. (Iowa), 86 N. W. 224 (1901).

[354] Insurance Co. v. Coombs, 19 Ind. App. 331, 49 N. E. 471 (1898).

[355] Harrington v. Fitchburg, etc., Ins. Co., 124 Mass. 126 (1878).

the former occupant of a house had moved with his family into another house, where they slept and took their meals, the house was vacant, although some furniture remained in the house and the keys had not been surrendered to the landlord.[356]

XII. Authorized Change of Location.

If the property covered by this policy is so endangered by fire as to require removal to a place of safety, and is so removed, that part of this policy in excess of its proportion of any loss and of the value of property remaining in the original location, shall, for the ensuing five days only, cover the property so removed in the new location; if removed to more than one location, such excess of this policy shall cover therein for such five days in the proportion that the value of any one such new location bears to the value in all such new locations; but this company shall not, in any case of removal, whether to one or more locations, be liable beyond the proportion that the amount hereby insured shall bear to the total insurance on the whole property at the time of fire, whether the same cover in new location or not.[357]

§ **292. In general.**—This provision authorizes the removal of the property when endangered by fire and provides that the policy shall remain in force for five days after such removal. It also provides for the amount of recovery whether the property is in the new location or not. It does not seem to have been construed by the courts. There are, however, numerous cases which determine the liability of the company for damage occasioned while the property is being removed from a building which is on fire or threatened with destruction.[358]

XIII. Renewal of Contract.

This policy may by a renewal be continued under the original stipulations, in consideration of premium for the renewed term, pro-

[356] Corrigan v. Connecticut F. Ins. Co., 122 Mass. 298 (1877).

[357] This provision is found in the standard policies of New York, New Jersey, Connecticut, Rhode Island, Wisconsin, Louisiana, Michigan, North Dakota, South Dakota, Iowa, and North Carolina. The standard policies of Massachusetts, Minnesota, Maine and New Hampshire provide that: "If such removal shall be necessary for the preservation of the property from fire, this policy shall be valid without such assent for five days thereafter."

[358] See § 218, *supra*.

vided that any increase of hazard must be made known to this company at the time of renewal or this policy shall be void.[359]

§ 293. **In general.**—Whether a renewal creates a new contract depends upon its terms. It has been held that every renewal of a policy of insurance, being upon a new consideration and optional with both parties, creates a new contract, and is, unless otherwise expressed, subject to the terms and conditions which are contained in the original policy.[360] Where the contract is renewed from year to year the description of the insured property in the original policy must be applied to the condition of the property at the date of the last renewal.[361] The clause quoted from the standard form does not provide that the premium must be paid at the time of the renewal. In Maryland it was held that where, under a policy of insurance, an option was given to renew the same at its expiration, and the insured elected to renew, and notified the company of its election, such notification did not bind the company unless accompanied by payment or tender of payment of the premium.[362] Where an application for renewal was made, and the company's agent filled out, signed and delivered the policy without asking for payment of the premium, it was held that there was a valid contract.[363] But where the company provided that it should not be liable by virtue of the policy or any renewal thereof until the premium had been actually paid, and it had been the custom of the agent to make renewals, deliver them and collect the premium, and ten days before the original contract expired the insured asked the agent to attend to its renewal, and he promised to do so, but nothing was done and the property was burned six months thereafter, it was held that the agent had not waived prepayment of the pre-

[359] This provision is found in the standard policies of New York, New Jersey, Connecticut, Rhode Island, Wisconsin, South Dakota, Iowa, Michigan, North Dakota, Louisiana, and North Carolina. It is not found in the standard policies of Massachusetts, Minnesota, Maine and New Hampshire.

[360] Hartford F. Ins. Co. v. Walsh, 54 Ill. 164, 5 Am. Rep. 115 (1870); Brady v. Northwestern Ins. Co., 11 Mich. 425 (1863); Aurora, etc., Ins. Co. v. Kranich, 36 Mich. 289 (1877). *Contra*, New England, etc., Ins. Co. v. Wetmore, 32 Ill. 221 (1863).

[361] Garrison v. Farmers', etc., Ins. Co., 56 N. J. L. 235, 28 Atl. 8 (1893).

[362] American Casualty Co.'s Case, 82 Md. 535; s. c. *sub nom.* Boston, etc., Co. v. Mercantile, etc., Co., 34 Atl. 778, 38 L. R. A. 97 (1896).

[363] Lum v. United States F. Ins. Co., 104 Mich. 397, 62 N. W. 562 (1895).

mium and that the company was not liable on the policy.[364] Where there was a verbal agreement to renew the risk, and payment of the premium was to be made on the first day of the succeeding month, which fell on Sunday, an offer to pay on Monday was sufficient, although the building was burned on Sunday.[365] The authorized agent of the company may renew a policy by parol, although the policy provides that it can be done only in writing.[366] A renewal need not be under seal, although the policy is under seal.[367] An agent of the company has power to make a valid parol agreement to renew a contract of insurance, although the policy and certificates of renewal issued by the company provide that it shall not be valid unless countersigned by the agent.[368]

An agreement to renew must have all the elements of a contract.[369] Where the authority of the agent was limited by the policy so that he could only renew on the same policy, "provided the premium be paid or indorsed on the policy or a receipt given," it was held that the company was not liable where the evidence merely showed a conversation between the insured and the agent which took place four

[364] Zigler v. Phœnix Ins. Co., 82 Iowa 569, 48 N. W. 987 (1891).

[365] Taylor v. Germania Ins. Co., 2 Dill. (C. C.) 282, Fed. Cas. No. 13,793 (1872). An insurance company agreed that a policy for one year should be a permanent risk, and that its officers should call for the premiums as they became due, and leave the certificates of payment and renewal. The assured party relying on this arrangement, did not call and pay the renewal premium, or get a renewal certificate. Before any of the officers called for the renewal premium, the property was destroyed by fire. Held, that the company was liable for the loss: Trustees, etc., v. Brooklyn F. Ins. Co., 18 Barb. (N. Y.) 69 (1854).

[366] Cohen v. Continental F. Ins. Co., 67 Tex. 325, 3 S. W. 296, 60 Am. Rep. 24 (1887). See Royal Ins. Co. v. Beatty, 119 Pa. St. 6, 12 Atl. 607 (1888).

[367] Lockwood v. Middlesex, etc., Assur. Co., 47 Conn. 553 (1880).

[368] Post v. Ætna Ins. Co., 43 Barb. (N. Y.) 351 (1864). See, also, Cohen v. Continental F. Ins. Co., 67 Tex. 325, 3 S. W. 296, 60 Am. Rep. 24 (1887).

[369] O'Reilly v. London Assur. Corp., 101 N. Y. 575, 5 N. E. 568 (1886); Johnson v. Connecticut F. Ins. Co., 84 Ky. 470 (1886). Mere silence of the agent when asked if the company would renew is not a renewal: Royal Ins. Co. v. Beatty, 119 Pa. St. 6, 12 Atl. 607 (1888). As to the authority of the agent to renew, see Carroll v. Charter Oak Ins. Co., 40 Barb. (N. Y.) 292 (1863); Baubie v. Ætna Ins. Co., 2 Dill. (C. C.) 156 (1873). A contract to "hold" certain expiring policies is a renewal: Baker v. Westchester F. Ins. Co., 162 Mass. 358, 38 N. E. 1124 (1894).

weeks before a renewal was necessary, of which the agent made no entry on the policy or in his books, gave no renewal receipt, and on which the insured never paid any premium or made any arrangement therefor.[370]

When a policy is renewed it is the duty of the insured to inform the company of any change in the nature or use of the property which increases the hazard. Where the insured made representations as to the nature of the occupancy of the premises, and stipulated that, should they be used and occupied so as to increase the risk without the notice and consent of the insurer in writing, the policy should be void, and that the insurance might be continued for such time as might be agreed upon, the performance of such conditions, unless otherwise specified in writing, should be construed as continued under the original representations, and an omission to give notice of a change of occupancy, increasing the risk, rendered a subsequent renewal invalid.[371] So, where a fire policy provided that "this insurance, the risk not being changed, may be continued for such further time as shall be agreed on * * * under the original representation, * * * but in case there shall have been a change in the risk, either within itself or of the neighboring buildings, not made known to the company by the assured at the time of renewal, this policy and renewal shall be void," it was held that if, after the first insurance and before the renewal policy was delivered, there was any change in the risk increasing the hazard, whether known to the insured or not, and it was not made known to the company at the time of the renewal, the policy and the renewal were void.[372] There is no increase of hazard under a policy which contains no provision against alienation, where the insured sells the property and takes back a mortgage as security for the purchase-money, and it is not necessary to give notice of this change in the nature of the interest at the time of the renewal.[373] Although by the terms of a mortgage clause in the policy the rights of a mortgagee were not to be affected by any act of the mortgagor in increasing the hazard during the life of the policy, it is necessary upon a renewal of the policy to inform the company of any facts which increase the hazard.[374] Like other provisions, this

[370] O'Reilly v. London Assur. Corp., 101 N. Y. 575, 5 N. E. 568 (1886).

[371] Wolff v. Oswego, etc., Ins. Co., 6 N. Y. St. Rep. 548 (1887).

[372] Brueck v. Phœnix Ins. Co., 21 Hun (N. Y.) 542 (1880).

[373] Phelps v. Gebhard F. Ins. Co., 9 Bosw. (N. Y.) 404 (1862).

[374] Cole v. Germania F. Ins. Co., 99 N. Y. 36, 1 N. E. 38 (1885).

requirement may be waived. Where the president of the company often stopped at a hotel which was the subject of the insurance, while additions were being made which were claimed to increase the risk, and gave his consent to the making of such changes, it was held that there was a waiver of a breach of the conditions, and upon renewal of the policy it was not necessary to make representations in writing as to the changes.[375]

§ **294. Illustrations.**—Where the policy does not state the procedure necessary to effect such renewal, the company can not show that there were secret limitations upon the authority of its agent to contract for renewal.[376] Where a policy upon a building was renewed it was held that an ordinance passed during the life of the original policy forbidding the rebuilding or repairing of wooden buildings within certain limits entered into the new contract created by renewal.[377] A policy covered the plaintiff's property generally, and an indorsement apportioned it among several items. Before the term expired plaintiff took the policy to defendant's agent and requested a renewal. Nothing was said in reference to a different policy, or to any alteration of the terms of the existing one, and it was held that it was the intention of the parties that the new policy should contain the same provisions as those indorsed on the old policy.[378] Where the policy covered a specified sum on a grist mill, and another sum on the machinery therein, and was renewed in general terms for an amount equal to the entire insurance, without any distribution of the risk, it was held that the insurance should thereafter be without distribution and apply generally to both building and machinery.[379] The owner of an insured building sold one-half of it to a partner, and at the expiration of the original policy a renewal certificate was issued reciting the receipt of the premium from the firm and the continuation of the policy, and that "the renewal is made upon condition that the original policy continues in force, and that there has been no change in the risk since first insured not noticed on the books of this company, otherwise this

[375] Martin v. Jersey City Ins. Co., 44 N. J. L. 273 (1882).

[376] McCullough v. Hartford F. Ins. Co., 2 Pa. Super. Ct. 233 (1896).

[377] Brady v. Northwestern Ins. Co., 11 Mich. 425 (1863).

[378] Cochran Cotton Seed Oil Co. v. Phœnix Ins. Co., 7 Misc. (N. Y.) 695, 28 N. Y. Supp. 45 (1894).

[379] Driggs v. Albany Ins. Co., 10 Barb. (N. Y.) 440 (1851).

renewal is not binding." It was held that the insurers intended to continue the insurance on the property on the terms and conditions expressed in the policy, for the benefit of the parties who paid the premium.[380]

§ 295. **Reformation of the policy.**—A renewal policy containing a coinsurance clause which was not in the original policy will be reformed where it appears that the renewal was solicited by the company with the understanding that the two policies were to be the same, and that the insured, relying upon the agreement and good faith of the company, did not read the policy and discover the material changes until after the loss had occurred.[381] A mortgagee applied to the company for a renewal with an increase of the insurance, which was agreed to, and the new policy contained a clause not in the first, that in case of loss the mortgagee should assign to the company all her right to receive satisfaction from any other person, and that the loss should not be payable until after the enforcement of the original security, and that the company should only be liable for so much as could not be collected. The mortgagee did not discover the change until after loss, and it was held that he might maintain an action to reform the policy and recover thereon as reformed, but that it was discretionary with the court to refuse relief on the ground of his neglect to discover the change within a reasonable time.[382]

XIV. Cancellation of Policy.

This policy shall be canceled at any time at the request of the insured; or by the company by giving five days' notice of such cancellation. If this policy shall be canceled as hereinbefore provided, or become void or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy or last renewal, this company retaining the customary short rate, except that when this policy is canceled by this company by giving notice it shall retain only the pro rata premium.[383]

[380] Lancey v. Phœnix F. Ins. Co., 56 Me. 562 (1869).

[381] Palmer v. Hartford Ins. Co., 54 Conn. 488, 9 Atl. 248 (1887).

[382] Hay v. Star F. Ins. Co., 77 N. Y. 235, 33 Am. Rep. 607 (1879).

[383] This provision is found in the standard policies of New York, New Jersey, Connecticut, Rhode Island, Louisiana, South Dakota, Iowa, Michigan, North Dakota, and North Carolina. The Wisconsin provision

§ 296. **In general.**—In a number of states there are statutes which secure to the parties the right to cancel a contract of insurance upon proper notice. Unless there is such a statute or stipulation in the contract of insurance, the policy can not be canceled without the consent of the insured.[384] The right does not exist unless reserved, and the clause conferring the right is in the nature of a condition precedent which must be strictly complied with in order to make an effort to cancel effective.[385] Where the policy provides that "the insurance may be terminated at any time at the request of the insured," a surrender of the policy, with the request that it be terminated, operates *ipso facto* as a cancellation.[386] Where the contract is intended to bind the insurer only so long as it chooses, it

is as follows: "This policy shall be canceled at any time at the request of the insured; or by the company by giving five days' notice of such cancellation; unless during a time in which the hazard shall be increased solely by the act of God, and in such case and during such time of such increase of hazard the company shall not cancel this policy except upon sixty days' notice of such cancellation, without the consent of the assured." The standard policies of Massachusetts, Minnesota, Maine and New Hampshire have the following provision: "This policy may be canceled at any time at the request of the insured, who shall thereafter be entitled to a return of the portion of the premium remaining, after deducting the customary monthly short rates for the time this policy shall have been in force. The company also reserves the right after giving written notice to the insured, and to any mortgagee to whom this policy is made payable, and tendering to the insured a ratable proportion of the premium, to cancel this policy as to all risks subsequent to the expiration of ten days from such notice, and no mortgagee shall then have the right to recover as to such risks."

[384] Alliance, etc., Ins. Co. v. Swift, 10 Cush. (Mass.) 433 (1852).

[385] Wicks v. Scottish, etc., Ins. Co., 107 Wis. 606, 83 N. W. 781 (1900); Van Valkenburgh v. Lenox F. Ins. Co., 51 N. Y. 465 (1873). Provisions for cancellation in an insurance policy must be strictly followed to effect that result: John R. Davis Lumber Co. v. Hartford F. Ins. Co., 95 Wis. 226, 37 L. R. A. 131 (1897). Transactions with reference to the cancellation of an insurance policy must be construed reasonably and fairly, and in accordance with the evident understanding of the parties at the time: Bingham v. Fire Ins. Co., 74 Wis. 498 (1889). The cancellation of a policy and the retention of the *pro rata* premium is a confirmation of the validity of the policy: Commercial Assur. Co. v. New Jersey Rubber Co. (N. J.), 49 Atl. 155 (1901).

[386] Crown Point Iron Co. v. Ætna Ins. Co., 127 N. Y. 608, 14 L. R. A. 147 (1891).

may cancel the policy at any time by notice to the other party.[387] After the liability of the company has become fixed by fire, notice of a previous election to cancel the policy has no effect on the contract.[388]

The right to cancel the policy thus reserved to the company can not be exercised under circumstances which would operate as a fraud on the insured; as where notice was given pending an approaching conflagration which threatened to destroy the insured property.[389] Where the policy provides for notice it means notice to the insured.[390] His rights can not be affected by the conduct of others who have no authority to represent him. The consent of a mortgagee, to whom the policy is made payable in case of loss, to a cancellation without the knowledge of the insured, is of no effect and does not deprive him of his rights.[391]

§ 297. **The time.**—This provision requires five days' notice of an intent to cancel the contract. An attempt to transfer the risk from a company which has refused to carry it to another without the consent of the insured, after the agent has placed the risk in the former company under a general request for insurance, without specifying any company, is ineffectual when the five days' notice of the cancellation of the first policy stipulated for therein was not given.[392] The parties may of course, by mutual consent, rescind the contract without such notice.[393]

§ 298. **Authority of agent to cancel.**—An agency to procure insurance is not, as a matter of law, presumed to continue for the purpose of canceling the policy.[394] It must appear that the person to whom notice was given was at the time the authorized agent of the

[387] Manchester F. Assur. Co. v. Insurance Co. of Ill., 91 Ill. App. 609 (1900).

[388] Massasoit Steam Mills Co. v. Western Assur. Co., 125 Mass. 110 (1878).

[389] Home Ins. Co. v. Heck, 65 Ill. 111 (1872).

[390] London, etc., Ins. Co. v. Turnbull, 86 Ky. 230 (1887).

[391] Peterson v. Hartford F. Ins. Co., 87 Ill. App. 567 (1900).

[392] Clark v. Ins. Co., 89 Me. 26, 35 L. R. A. 276 (1896).

[393] Sea Ins. Co. v. Johnston, 105 Fed. 286, 44 C. C. A. 477 (1900).

[394] Broadwater v. Lion F. Ins. Co., 34 Minn. 465 (1886); Hermann v. Niagara F. Ins. Co., 100 N. Y. 411 (1885); Grace v. American, etc., Ins. Co., 109 U. S. 278 (1883); White v. Connecticut F. Ins. Co., 120 Mass. 330 (1876); Adams v. Manufacturers', etc., Ins. Co., 12 Ins. L. J. 787 (1883).

insured for the purpose of canceling the policy, or that the act was subsequently ratified by the insured.[395] So, where a broker had been employed by the plaintiff to procure a fire policy on certain property, notice afterwards given by the company to such broker of an intention to cancel the policy was held not sufficient to effect a cancellation.[396] Mere notice to a broker or the agent of the insured that the company desires to cancel the policy is not enough where the policy contains a provision that it may be terminated by notice to the person who procured it.[397] The agent of the company can not give notice to himself as the person who procured the insurance.[398] A delivery of the policy to an agent of the insurer for cancellation by a clerk in the office of the agent of the insured, who was authorized to deliver up the policy for cancellation, is the act of the insured, and not of the insurer, and will support a cancellation of the policy.[399] But where the insured left the policy in the hands of her agent, and thus placed it in his power to mislead the insurer by surrendering the policy, and the insurer acted in good faith in canceling it, it was held that the insured was bound by this surrender, although it was without authority.[400]

An agent may, under certain circumstances, represent both parties. A general insurance agency representing both parties, with authority to act upon applications and issue policies, as well as to cancel the same in proper cases, may also act as the agent of the insured in waiving notice of cancellation and in accepting delivery of the new policy when substituted for the one canceled. In Minnesota it was said:[401] "Such a business arrangement is in many cases adopted by business firms and corporations in cities, and is beneficial both to the underwriters and parties insured; adding to the business of the one and relieving the other from anxiety regarding the expiration and

[395] Quong Tue Sing v. Anglo-Nevada Assur. Corp., 86 Cal. 566, 10 L. R. A. 144 (1890).

[396] Healy v. Insurance Co., 63 N. Y. Supp. 1055, 50 App. Div. (N. Y.) 327 (1900).

[397] Hermann v. Niagara F. Ins. Co., 100 N. Y. 411 (1885).

[398] Insurance Companies v. Raden, 87 Ala. 311 (1888).

[399] Faulkner v. Manchester F. Assur. Co., 171 Mass. 349, 50 N. E. 529 (1898).

[400] Kooistra v. Rockford Ins. Co., 122 Mich. 626, 81 N. W. 568 (1900).

[401] Hamm Realty Co. v. New Hampshire F. Ins. Co., 80 Minn. 139, 83 N. W. 41 (1900). See, also, s. c. 87 N. W. 933 (1901); Dibble v. Northern Assur. Co., 70 Mich. 1, 37 N. W. 704 (1888); Buick v. Mechanics' Ins. Co., 103 Mich. 75, 61 N. W. 337 (1894); Stone v. Franklin F. Ins. Co., 105 N. Y. 543, 12 N. E. 45 (1887); Arnfeld v. Guardian Assur. Co., 172 Pa. St. 605, 34 Atl. 580 (1896).

replacement of risks. The long course of business usage and custom pursued with uniformity between the agency representing the defendant and other companies and plaintiff, in which the latter had permitted the former to act for it, would justify the conclusion that the agency was authorized to act for the plaintiff in waiving notice of cancellation and in accepting the new policy of insurance by which the delivery of such policy was accomplished as fully as if the plaintiff's manager had been present and received such policy into his own hands."

§ 299. **Return of premium.**—This provision relating to cancellation at the instance of the company requires that, in addition to giving five days' notice, it must return or tender the unearned premium in order to effect a cancellation. Mere notice that the unearned premium will be returned by the agent of the company is not sufficient.[402] There must be an actual return or tender of the money.[403] A mere request that the policy be returned and a promise to return the premiums are not effective.[404] A tender of a part of the unearned premium, together with a policy of insurance in another company representing the remainder of such premium, will not terminate a policy which provides for its own termination upon the refunding or tendering back to the insured of a ratable proportion of the premium for the unexpired term of the policy.[405] An attempt to rescind the contract is not a cancellation of the policy. So, a tender of the unearned premiums upon a policy and a demand for its surrender for the purpose of the rescission of the contract from the beginning, and a refusal upon that ground, are not a sufficient tender to effect a cancellation under the terms of the policy.[406]

[402] Tisdell v. New Hampshire F. Ins. Co., 155 N. Y. 163, 49 N. E. 664 (1898). See, also, to the same effect, Nitsch v. American, etc., Ins. Co., 152 N. Y. 635, 83 Hun 614, 46 N. E. 1149 (1897).

[403] Ætna Ins. Co. v. Maguire, 51 Ill. 342 (1869); Franklin F. Ins. Co. v. Massey, 33 Pa. St. 221 (1859); Hathorn v. Germania Ins. Co., 55 Barb. (N. Y.) 28 (1869); Goit v. National, etc., Ins. Co., 25 Barb. (N. Y.) 189 (1855); Peoria, etc., Ins. Co. v. Botto, 47 Ill. 516 (1868); Hollingsworth v. Germania, etc., Ins. Co., 45 Ga. 294 (1872); Peterson v. Hartford F. Ins. Co., 87 Ill. App. 567 (1900).

[404] Griffey v. New York, etc., Ins. Co., 100 N. Y. 417 (1885); Tisdell v. New Hampshire F. Ins. Co., 155 N. Y. 163, 40 L. R. A. 765 (1898).

[405] Quong Tue Sing v. Anglo-Nevada Assur. Corp., 86 Cal. 566, 10 L. R. A. 144 (1890).

[406] John R. Davis Lumber Co. v. Hartford F. Ins. Co., 95 Wis. 226, 37 L. R. A. 131 (1897).

The insured is estopped to assert the non-return of the premium after having induced the company's agent to believe that the cancellation was recognized by him without such payment.[407] The provision requiring the return of the unearned premium may be waived or disregarded by the parties, and if their minds meet upon an agreement that the policy is canceled it is sufficient.[408] A cancellation of a policy which provides that it may be terminated on notice is effective *eo instanti* on notice given in good faith by the insurer where no premium has ever been paid.[409]

§ 300. **What amounts to a cancellation.**—The notice under this provision must be unequivocal, as a mere notice of a desire to cancel or to deliver the policy for cancellation is not sufficient.[410] The notice must be communicated to the insured, and it is held in New York and California that merely mailing notice does not effect a cancellation when it was not in fact received by the insured.[411] This provision in the standard policy is not complied with by sending the insured a letter notifying him of an intention to cancel the policy without further notice, and stating that a *pro rata* part of the unearned premium will be returned.[412] Cancellation of the policy is not affected by the fact that the insured was induced to authorize its cancellation through mistake or misrepresentations of his agent concerning directions from the insurance company.[413] The mailing of the policy with the obvious purpose of its cancellation to, and its receipt by the company, effect a cancellation.[414]

Where four days before the loss the company wrote a letter to the insured stating that the policy had been canceled according to notice given in a former letter, it was held that the company was liable, where it did not appear that the former notice had been given, and

[407] Hopkins v. Phœnix Ins. Co., 78 Iowa 344 (1889).

[408] Bingham v. Insurance Co., 74 Wis. 498 (1889).

[409] Lipman v. Niagara F. Ins. Co., 121 N. Y. 454, 8 L. R. A. 719 (1890).

[410] Lyman v. State, etc., Ins. Co., 14 Allen (Mass.) 329 (1867); Griffey v. New York, etc., Ins. Co., 100 N. Y. 417, 53 Am. Rep. 202 (1885).

[411] Crown Point Iron Co. v. Ætna Ins. Co., 127 N. Y. 608, 14 L. R. A. 147 (1891); Farnum v. Phœnix Ins. Co., 83 Cal. 246 (1890).

[412] Tisdell v. New Hampshire F. Ins. Co., 155 N. Y. 163, 40 L. R. A. 765 (1898).

[413] Parker, etc., Mfg. Co. v. Exchange F. Ins. Co., 166 Mass. 484, 44 N. E. 614 (1896).

[414] Ikeller v. Hartford F. Ins. Co., 53 N. Y. Supp. 323, 24 Misc. (N. Y.) 136 (1828).

where there was nothing to show an intention to surrender for immediate cancellation.[415] Under a written agreement which provided that the policy should remain in force from the date of expiration until discontinuance, and the insured paid *pro rata* for the time used, it was held that the sending of a check for an additional month's insurance was not notice of a discontinuance at the end of that month.[416] When the report of an oral contract of reinsurance was received at the office of the company, the secretary called the agents by telephone and directed them to cancel such reinsurance. The agents delivered the message by telephone to an assistant in the office of the company procuring the reinsurance, and who usually received orders over the telephone both for writing and canceling insurance, and it was held sufficient to show that the reinsurance, if ever written, had been canceled.[417] In another case it appeared that the company issued a policy to the plaintiff which provided that it could be canceled by the company upon giving five days' notice. There was a provision that only a *pro rata* premium should be retained by the company on its cancellation of the policy. The special agent and adjuster of the company wrote the local agent, directing him to cancel the policy. The local agent wrote the insured requesting a return of the policy, and inclosed two policies in other companies in lieu of the one issued by the defendant. The letter was received by the insured on Saturday afternoon, and on Saturday night the property was destroyed by fire. The letter was not opened until Monday morning, and it was held that the letter and acts did not constitute a cancellation of the defendant's policy.[418]

A company demanded payment of premiums earned upon an open policy, and received a letter from the insured stating that they could not "go on" unless the rate was reduced. The company refused to make a reduction and again sent the bill asking that if the insured decided not to continue using the policy that it be returned to it. The insured returned the policy and check for the amount of the bill, saying, "We inclose check and policy, which we suppose will conclude the whole matter. If we are mistaken please return check." The check was cashed, and it was held that the policy was rescinded

[415] Healy v. Insurance Co., 63 N. Y. Supp. 1055, 50 App. Div. (N. Y.) 327 (1900).

[416] Greenwich Ins. Co. v. Providence, etc., Co., 119 U. S. 481 (1886).

[417] Manchester F. Assur. Co. v. Insurance Co., 91 Ill. App. 609 (1900).

[418] Partridge v. Milwaukee, etc., Ins. Co., 162 N. Y. 597, 13 App. Div. (N. Y.) 519, 57 N. E. 1119 (1900).

by mutual consent.[419] Where a policy contained a provision for cancellation by the insurance company upon giving five days' notice of a surrender by the holder, the company was held liable for a loss occurring within the five days. The court said:[420] "The assumption that it was M.'s intention to assent to an immediate cancellation does violence to his business judgment. He is presumed to know of plaintiff's rights under the policy, and under the circumstances it is quite reasonable to assume that by sending the policy to them he intended nothing more than that they should hold it for cancellation under its terms. There is a lack of any circumstances to show an intent to surrender for instant cancellation. Every probability tends the other way. * * * The absence of any showing of an intention to consent to immediate cancellation is fatal to the defendant's contention. Without such showing the acts of the plaintiff's agent must be construed as being in harmony with the continuance of the insurance contract until canceled pursuant to its terms. The right of cancellation does not exist at all except by contract, and stipulations to that effect are construed with reasonable strictness."

XV. *Waiver.*

No officer, agent or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto, and as to such provisions and conditions no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached.

This company shall not be held to have waived any provision or condition of this policy or any forfeiture thereof by any requirement, act, or proceeding on its part relating to the appraisal or to any examination herein provided for.[421]

[419] Sea Ins. Co. v. Johnston, 105 Fed. 286, 44 C. C. A. 477 (1900).

[420] Wicks v. Scottish Union, etc., Ins. Co., 107 Wis. 606, 83 N. W. 781 (1900).

[421] This provision is found in the standard policies of New York, New Jersey, Connecticut, Rhode Island, South Dakota, Iowa, Louisiana, North Dakota, Michigan, and North Carolina. Wisconsin adds the words: "Up to the time of the delivery of this policy to assured, in all transactions relating to this pol-

§ **301. Limitations upon power to waive.**—This provision limits the authority of officers and agents of the insurer to such matters as they are expressly authorized to waive by the terms of the policy. The general subject of waiver has been discussed elsewhere and but little need be added at this time.[422] The prevailing rule seems to be that, notwithstanding this provision, a general agent of the company may waive this as well as other provisions of the policy.[423] Thus, the provision requiring the insured to keep books showing purchases and sales in an iron safe, in a policy which contains a provision that no officer or agent of the company shall have power to waive any condition or provision, unless in writing, may be waived by parol by an agent having general authority to make contracts of insurance.[424] It is the settled rule that an agent of a fire insurance company may, by issuing a policy with knowledge of facts, waive a condition that the policy shall be void if the property insured be incumbered and the fact of incumbrance be not indorsed on the policy, notwithstanding the provision in the policy that no agent of the company shall have power to waive any such condition except by written indorsement.[425] Under this provision the policy was held void on the ground that the property had been removed

icy or the property herein insured, between the assured and any agent of the company, knowledge of the agent shall be knowledge of the company; and in all transactions relating to the subject of the insurance, between the insured and any agent of the company after loss, knowledge of the agent shall be knowledge of the company." The provision is not found in the standard policies in use in Massachusetts, Minnesota, Maine, and New Hampshire.

[422] See ch. IX.

[423] Langan v. Ætna Ins. Co., 96 Fed. 705 (1899). But see Northern Assur. Co. v. Grand View Bldg. Ass'n (U. S.), 22 Sup. Ct. 133 (1902), reversing 41 C. C. A. 207.

[424] Hanover F. Ins. Co. v. Dole, 20 Ind. App. 333, 50 N. E. 772 (1898).

[425] Skinner v. Norman, 165 N. Y. 565, 59 N. E. 309 (1901); London, etc., Ins. Co. v. Fischer, 92 Fed. 500 (1899). In German Ins. Co. v. Amsbaugh, 8 Kan. App. 197, 55 Pac. 481 (1898), the rule announced in American Central Ins. Co. v. McLanathan, 11 Kan. 533 (1873), and Phenix Ins. Co. v. Munger, 49 Kan. 178, 30 Pac. 120 (1892), as to the authority of insurance agents to waive conditions of the policy, was applied, and it was held that the agent of the company which issued the policy sued on had authority to waive the provision of the policy limiting the time within which suit should be brought to recover for the loss. In Ordway v. Continental Ins. Co., 35 Mo. App. 426 (1889), it was said that the settled policy of the state was that an agent might waive a stipulation in the policy against concurrent insurance.

without the consent of the company, although it appeared that the insured had informed the agent of the company that he was about to remove it to another place of residence, and requested the agent to procure the consent of the company in due form. It also appeared that the agent thereafter returned the policy to the insured and informed him that all the formalities had been complied with and that the policy would cover the property in the new location.[426]

The provision to the effect that the company shall not be held to have waived any forfeiture by any requirement, act or proceeding relating to appraisal is valid.[427] Hence, where the policy provided that proofs of loss should be made within sixty days after loss on penalty of forfeiture, it was held that this provision was not waived by submitting the question of the amount of loss to appraisers within sixty days after loss.[428]

[426] Hill v. London Assur. Corp., 9 N. Y. Supp. 500 (1890), s. c. 12 N. Y. Supp. 86 (1890).

[427] See American, etc., Ins. Co. v. Bass, 90 Tex. 380, 38 S. W. 1119 (1897).

[428] Fournier v. German, etc., Ins. Co. (R. I.), 49 Atl. 98 (1901).

CHAPTER XII.

PROVISIONS OF THE STANDARD POLICY, CONTINUED.

B. Provisions Relating to Matters Subsequent to a Loss.

§ 302. **In general.**—The provisions of the insurance contract fall naturally into two classes separated by the fact of loss. While all provisions are valid and binding upon the parties, they are not for purposes of construction treated as of equal importance. It is apparent that matters required to be done by the insured after the capital fact of loss should not be construed with the same strictness as those which define and limit the terms of the contract itself. Hence, we find that the stipulations treated of in this chapter are more liberally construed in favor of the insured, and that the courts are more easily satisfied of the fact of a waiver.

XVI. Notice and Proof of Loss.

If fire occur the insured shall give immediate notice of any loss thereby in writing to this company, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, make a complete inventory of the same, stating the quantity and cost of each article and the amount claimed thereon; and, within sixty days after the fire, unless such time is extended in writing by this company, shall render a statement to this company, signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire; the interest of the insured and of all others in the property; the cash value of each item thereof and the amount of the loss thereon; all incumbrances thereon; all other insurance, whether valid or not, covering any of the said property; and a copy of all the descriptions and schedules in all policies; any changes in the title, use, occupation, location, possession, or exposures of said property since the issuing of this policy; by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of fire; and shall furnish, if required, verified plans and specifications of any building, fixtures, or machinery destroyed or damaged; and shall also, if required, furnish a certificate of the magistrate or notary public (not interested in the claim as a creditor or otherwise, nor related to the insured) living nearest the place of fire, stating that he has examined the circumstances and believes the insured has honestly sustained loss to the amount that such magistrate or notary public shall certify.[1]

§ 303. Definition—Compliance.—By proof of loss is meant such a statement of facts, reasonably verified, as, if established in court,

[1] This provision is found in the standard policies of New York, New Jersey, Rhode Island, Connecticut, Michigan, Louisiana, Iowa, Wisconsin, South Dakota, North Dakota, and North Carolina. Massachusetts, Maine and New Hampshire have the following provision: "In case of any loss or damage under this policy, a statement in writing, signed and sworn to by the insured, shall be forthwith rendered to the company, setting forth the value of the property insured, and the interest of the insured therein, all other insurance thereon, in detail, the purposes for which and the persons by whom the building insured, or containing the property insured, was used, and the time at which and manner in which the fire originated, so far as known to the insured." The Minnesota provision is similar to that of Massachusetts except that "in total loss on buildings, the value of the said buildings need not be stated."

will *prima facie* require the payment of the loss. It does not mean some particular form of proofs which the insurer arbitrarily demands.[2] The proofs do not form part of the contract of insurance; and the insured is not estopped from showing that statements in his proofs of loss were erroneous in so far as they state facts tending to annul the policy.[3] Nor is the insured concluded as to the amount of loss by a statement in the proofs when the company refuses to pay on the basis of that amount.[4] A misstatement made by the owner in his proofs of loss, through mistake and without intent to defraud, with an understanding with the adjuster that it may be subsequently corrected, will not prevent a recovery.[5]

It is sufficient if this requirement of the policy is substantially complied with.[6] An affidavit describing the premises, stating the loss and the date thereof, the amount of damage and the insurance, and that the cause of the fire is unknown, is a substantial compliance with the provision requiring proofs of loss.[7] Under the Minnesota form, proofs of loss need not contain a specific demand or claim of a particular amount. "This contention," said the court,[8] "is based on the theory that, as the company has the right to have the amount of its liability determined by arbitration in case the parties do not agree upon that subject, unless the insured makes some specific claim

[2] Jarvis v. Northwestern, etc., Ass'n, 102 Wis. 546, 72 Am. St. 896 (1899). See, also, Insurance Co. v. Rodel, 95 U. S. 232 (1877).

[3] Fowle v. Springfield, etc., Ins. Co., 122 Mass. 191, 23 Am. Rep. 308 (1877); McMaster v. Insurance Co., 55 N. Y. 222, 14 Am. Rep. 239 (1873).

[4] Corkery v. Security F. Ins. Co., 99 Iowa 382, 68 N. W. 792 (1896).

[5] Garner v. Mutual F. Ins. Co. (Iowa), 86 N. W. 289 (1901).

[6] Robinson v. Palatine Ins. Co. (N. M.), 66 Pac. 535 (1901); Georgia, etc., Ins. Co. v. Goode, 95 Va. 751, 30 S. E. 366 (1898). In Bumstead v. Dividend, etc., Ins. Co., 12 N. Y. 81, Woodruff Ins. Cas. 185 (1854), it is held that the provisions requiring proofs of loss and notice within any designated time, are reasonable and binding, but that they should be given a fair and reasonable construction. A particular account of the loss or damage, etc., requires the party only to furnish a statement as particular and full as he can, under the circumstances, make. Hence, where his books and papers were destroyed by the same fire that destroyed the insured property, and he is thus deprived of the only means by which he can comply literally with the conditions of the policy, a less particular statement is sufficient. See, also, People's F. Ins. Co. v. Pulver, 127 Ill. 246 (1889).

[7] Rochester Loan, etc., Co. v. Liberty Ins. Co., 44 Neb. 537, 48 Am. St. 745 (1895).

[8] DeRaiche v. Liverpool, etc., Ins. Co. (Minn.), 86 N. W. 425 (1901).

against the company, no controversy or dispute as to the amount can arise, and therefore the terms of the policy with reference to arbitration become inoperative and of no effect. The position can not be sustained. As stated, the proof of loss is in literal compliance with the terms of the policy and contains every fact required to be stated therein, and can only be held insufficient by judicially reading into the terms of the policy a provision that the insured must, in addition to the matters required to be stated, also make a specific claim as to the amount of the loss. A substantial compliance with the terms of the policy with respect to proof of loss is uniformly held sufficient. If the matters and information required to be stated and given therein are set out in substance and effect, the proof is sufficient. We have found no case requiring the insured to go beyond this, or to state or set forth any matters not specially provided for. So the full answer to the defendant's contention is found in the fact that the policy does not require proof of loss to contain a statement of the amount claimed by the insured. It is not a question to be reasoned out by analogy, but rather to be determined from a reasonable interpretation of the policy. The fact that the presentation of a specific claim by the insured would enable the company to refuse payment if deemed excessive, and thus bring into operation the arbitration provisions of the policy, is no reason why the court should read into the contract a requirement not made a part thereof by the parties. The right to have the amount of the loss determined by arbitration is in no measure obstructed or prevented by a failure on the part of the insured to demand a specific sum. The company may, upon notice of loss, investigate the fire, the extent of the damage and loss, and make such offer of settlement as it may deem fair and just; and, if the insured declines to accept the same, an arbitration may then be had."

Whether notice is given or proof served within the time is ordinarily a question to be determined by the jury, but the sufficiency of the proofs is a question for the court.[9]

§ 304. "Immediate" notice.—The word "immediate" in this connection means such convenient time as is necessary under the circumstances to do the thing required.[10] It must not be given a literal

[9] Travelers' Ins. Co. v. Sheppard, 85 Ga. 751 (1890).

[10] Kentzler v. American, etc., Acc. Ass'n, 88 Wis. 589 (1894).

construction.[11] Notice must be given within a reasonable time—with due diligence.[12] A notice given two days after the loss is given immediately within the meaning of this provision.[13] Whether proofs of loss are furnished within a reasonable time is for the jury to determine.[14] Where the plaintiff omitted to give immediate notice of loss as required, and it appeared that the policy was transferred before the fire to the plaintiff, and that he had no knowledge of its contents, and that he used due diligence to discover the policy, which had accidentally fallen behind a case of pigeonholes in his office, to ascertain what it required, and that, notwithstanding such diligence, he obtained neither the policy nor any information as to the notice until fifty days after the fire, and that notice, dated three days after obtaining possession of the policy, was prepared and served with due diligence, the company receiving it three days after its date, it can not be held, as a matter of law, that the service of the notice was not within a reasonable time.[15] An unexcused delay of eleven days,[16] and, in another case, of forty-eight days, has been held fatal.[17] So, a failure for nearly sixty days after a fire to give notice of loss is, as a matter of law, a breach of the condition.[18] But in one case a delay of thirty-five days in making proof of loss was excused under the circumstances.[19] When loss occurs on October 3, proofs of loss sent the company on December 8 are not "forthwith rendered."[20] The

[11] Matthews v. American, etc., Ins. Co., 154 N. Y. 449, 39 L. R. A. 433, 48 N. E. 751 (1897); Pennypacker v. Capital Ins. Co., 80 Iowa 56, 8 L. R. A. 236 (1890).

[12] Solomon v. Continental F. Ins. Co., 160 N. Y. 595, 73 Am. St. 707, 46 L. R. A. 682 (1899). As to what constitutes compliance with a provision requiring "immediate notice," see cases collected in note to Phenix Ins. Co. v. Pickel, 12 Am. St. 404 (1889). See, also, Bennett v. Lycoming, etc., Ins. Co., 67 N. Y. 274 (1876); Kimball v. Howard F. Ins. Co., 8 Gray (Mass.) 33 (1857); Kingsley v. New England, etc., Ins. Co., 8 Cush. (Mass.) 393 (1851); People's Acc. Ass'n v. Smith, 126 Pa. St. 317 (1889); Rokes v. Amazon Ins. Co., 51 Md. 512, 34 Am. Rep. 323 (1879).

[13] Taber v. Royal Ins. Co., 124 Ala. 681, 26 So. 252 (1899).

[14] Fletcher v. German, etc., Ins. Co., 79 Minn. 337, 82 N. W. 647 (1900).

[15] Solomon v. Continental F. Ins. Co., 160 N. Y. 595, 73 Am. St. 707 (1899).

[16] Trask v. State, etc., Ins. Co., 29 Pa. St. 198, 72 Am. Dec. 622 (1858).

[17] Brown v. London Assur. Corp., 40 Hun (N. Y.) 101 (1886).

[18] Ermentrout v. Girard, etc., Ins. Co., 63 Minn. 305, 56 Am. St. 481 (1895).

[19] Knickerbocker Ins. Co. v. McGinnis, 87 Ill. 70 (1877).

[20] Parker v. Farmers', etc., Ins. Co. (Mass.), 61 N. E. 215 (1901).

company was held to have received timely notice of loss, where the policy required immediate written notice, where its local agent knew of the fire and had several conversations with the insured, who made a verbal claim of loss, and thereafter the agent wrote the company, which, ten days after the fire, sent out an adjuster, and final proofs of loss were sent to the defendant, who retained them without comment.[21] So, where a general agent of the company, on the day of the loss, notified the company of the loss, and within a few days thereafter the company sent an adjuster with power to investigate, adjust and settle the loss, it was held that the requirement of immediate notice had been complied with.[22] It has been held that notice by parol to an agent of the insurance company is of no effect where the charter contains a condition that notice must be given in writing to the secretary or one of the directors.[23] The policy sometimes requires that notice shall be given "forthwith." This word is given the same construction as "immediate," and requires that the notice be given with due diligence—within a reasonable time and without unnecessary delay.[24] Hence, whether a statement is rendered "forthwith" depends upon all the circumstances, and is for the jury to determine.[25] A failure to render such statement until about two months after the fire is not necessarily a failure to render it "forthwith," if the delay is accounted for by the ill health of the assured, the confusion attending the fire, and other such obstructions.[26]

§ 305. Separation of goods "forthwith."—After giving immediate notice of the loss to the company the insured must proceed "forth-

[21] Partridge v. Milwaukee, etc., Ins. Co., 13 App. Div. (N. Y.) 519, 162 N. Y. 587, 57 N. E. 1119 (1900).

[22] Kahn v. Traders' Ins. Co., 4 Wyo. 419, 62 Am. St. 47 (1893).

[23] Patrick v. Farmers' Ins. Co., 43 N. H. 621, 80 Am. Dec. 197 (1862). In Ermentrout v. Girard, etc., Ins. Co., 63 Minn. 305, 56 Am. St. 481 (1895), it was held that notice to the local agent was not notice to the company.

[24] Central City Ins. Co. v. Oates, 86 Ala. 558, 11 Am. St. 67 (1888). See also, Pennypacker v. Capital Ins. Co., 80 Iowa 56, 20 Am. St. 395 (1890); St. Louis Ins. Co. v. Kyle, 11 Mo. 278, 49 Am. Dec. 74 (1848); Griffey v. New York, etc., Ins. Co., 100 N. Y. 417 (1885); Mason v. St. Paul, etc., Ins. Co., 82 Minn. 336, 85 N. W. 13 (1901); Whitehurst v. North Carolina, etc., Ins. Co., 7 Jones (N. C.) 433, 78 Am. Dec. 246 (1860).

[25] Harnden v. Milwaukee, etc., Ins. Co., 164 Mass. 382, 49 Am. St. 467 (1895).

[26] Harnden v. Milwaukee, etc., Ins. Co., 164 Mass. 382, 49 Am. St. 467 (1895).

with" to separate the damaged from the undamaged personal property. "Forthwith," like immediate, means with due diligence under all the circumstances.[27]

§ 306. **Excuses for failure to furnish proofs.**—The courts recognize the fact that these stipulations with relation to what should be done after loss should not be construed with the same strictness as those which constitute the essential conditions of the contract. Hence, there may be circumstances which will excuse a failure to make proofs of loss as required by the policy. Thus, the insanity of the insured is a sufficient excuse for not making proofs of loss within the specified time.[28] As said in a recent case in New York:[29] "It is well settled that when the liability has become fixed by the capital fact of loss within the range of the responsibility assumed in the contract, the courts are reluctant to deprive the insured of the benefit of the liability by any narrow or technical construction of the conditions and stipulations which prescribe the formal requisites by means of which this accrued right is to be made available for his indemnification. While it is true that the policy in suit contained the usual clause as to proofs of loss being filed within sixty days, and that no officer, agent or other representative of the company should have power to waive any condition thereof, except by a written agreement indorsed thereon, yet a party to a contract containing such a provision may, by conduct, estop himself from enforcing it against one who has acted in reliance upon such conduct. He may also be estopped by the act of an agent who possesses, or whom he has held out to possess, this power in respect to the provision."

Failure to comply with this provision does not defeat the claim of a beneficiary when he does not know of the existence of the policy, or of the death of the insured, until more than a year thereafter, and then notifies the company at once after acquiring such knowledge.[30] The policy requires that the proof shall be made and signed by the

[27] Fletcher v. German, etc., Ins. Co., 79 Minn. 337, 82 N. W. 647 (1900). See cases cited in previous section.

[28] Insurance Companies v. Boykin, 12 Wall. (U. S.) 433 (1870); Wheeler v. Connecticut, etc., Ins. Co., 82 N. Y. 543, 37 Am. Rep. 594 (1880).

[29] Sergent v. Liverpool, etc., Ins. Co., 155 N. Y. 349, 49 N. E. 935 (1898); McNally v. Phœnix Ins. Co., 137 N. Y. 389, 33 N. E. 475 (1893); Bishop v. Agricultural Ins. Co., 130 N. Y. 488, 29 N. E. 844 (1891).

[30] McElroy v. John Hancock, etc., Ins. Co., 88 Md. 137, 71 Am. St. 400 (1898).

insured, but when he is not in a position personally to comply with this requirement it may be done by his agent.[31] Thus, where the insured at the time is out of the state, the proofs may be signed by his agent.[32] The provision must be given a reasonable construction. So, where the insured dies, the right to indemnity is not lost by a failure to comply with the provision literally, owing to such death and the absence of persons qualified to give such notice and make such proofs. Upon the death of the insured it is the duty of those interested to use every reasonable effort to comply with the provision. Where no executor has been appointed because of the contest of a will, the heirs or next of kin should, within a reasonable time, give notice of the loss and make the proof provided for in the policy, or procure the appointment of a special or temporary administrator to do so. Where this was not done, and where no notice of loss was given until more than two years after the death of the insured, the company was held to have been relieved from liability.[33]

Where the insured returned the proofs of loss, signed and sworn to by his attorney in fact, and gave as a reason therefor the fact that such attorney negotiated the policy and lived in the property, and that the insured was sick and not able to execute the power of attorney before a justice, it was held that the insured had not shown a sufficient excuse for not signing and swearing to the proofs himself, and that therefore he could not maintain an action on the policy.[34] The fact that the insured was occupied with other business and forgot to give notice is not a sufficient excuse.[35]

§ 307. **When a condition precedent.**—Where the policy does not provide that a failure to furnish proofs of loss within the stipulated time shall operate as a forfeiture, it is generally held that the policy is not invalidated by such failure.[36] In such case a failure to furnish

[31] Lumbermen's, etc., Ins. Co. v. Bell, 166 Ill. 400, 57 Am. St. 140 (1897).

[32] Walsh v. Vermont, etc., Ins. Co., 54 Vt. 351 (1882).

[33] Matthews v. American, etc., Ins. Co., 154 N. Y. 449, 61 Am. St. 627 (1897).

[34] Kowicz v. Teutonia Ins. Co. (Pa. Com. Pl.), 30 Pittsb. Leg. J. 140.

[35] Smith, etc., Co. v. Travelers' Ins. Co., 171 Mass. 357, 50 N. E. 516 (1898). See also, Harnden v. Milwaukee, etc., Ins. Co., 164 Mass. 382, 41 N. E. 658 (1895).

[36] Orient Ins. Co. v. Clark, 22 Ky. L. 1066, 59 S. W. 863 (1900); Northern Assur. Co. v. Hanna, 60 Neb. 29, 82 N. W. 97 (1900); Flatley v. Phenix Ins. Co., 95 Wis. 618, 70 N. W. 828 (1897).

proof of loss within the required time does not forfeit the policy if the proofs are furnished before the expiration of the time for bringing an action.[37] The supreme court of Minnesota, in a recent case, said:[38] "It is very generally held by the authorities, in cases where this question has been presented, that unless the policy provides for a forfeiture, or makes the service of proofs of loss within the time specified therein a condition precedent to the liability of the company, the time within which such proofs are required to be furnished is not of the essence of the contract. Where no forfeiture is provided by the terms of the contract, and the service of the proofs of loss within the specified time is not made a condition precedent to the liability of the company, the effect of such failure is simply to postpone the day of payment. No liability attaches to the company, however, until such proofs are furnished; but, unless otherwise provided, expressly or by fair implication, it is not important that proofs be not in fact served within the time stated in the policy.[39] It has been held by this court that a failure of strict compliance with similar provisions in the policies there under consideration was a condition precedent to the company's liability, but such policies contained express provisions to that effect, and the decisions there made are based on that fact."[40] Where the policy provides that the loss shall not be payable until sixty days after proofs of loss have been furnished, and that no suit on the policy can be commenced within twelve months after the fire, the insured must submit his proofs of loss in time for sixty days to elapse between the time when they were furnished and the expiration of the twelve

[37] American, etc., Ins. Co. v. Heaverin, 18 Ky. L. 190, 35 S. W. 922 (1896).

[38] Mason v. St. Paul, etc., Ins. Co., 82 Minn. 336, 85 N. W. 13 (1901).

[39] 2 May Ins. (4th ed.) 1097, note a; Coventry v. Evans, 102 Pa. St. 281 (1883); Carpenter v. German, etc., Ins. Co., 52 Hun (N. Y.) 249, 4 N. Y. Supp. 925 (1889); Vangindertaelen v. Phenix Ins. Co., 82 Wis. 112, 51 N. W. 1122 (1892); Rynalski v. Insurance Co., 96 Mich. 395, 55 N. W. 981 (1893); Northern Assur. Co. v. Hanna, 60 Neb. 29, 82 N. W. 97 (1900); Steele v. German Ins. Co., 93 Mich. 81, 53 N. W. 514 (1892); Kenton Ins. Co. v. Downs, 90 Ky. 236, 13 S. W. 882 (1890); Sun Mut. Ins. Co. v. Mattingly, 77 Tex. 162, 13 S. W. 1016 (1890); Kahnweiler v. Phœnix Ins. Co., 57 Fed. 562 (1893); Southern F. Ins. Co. v. Knight, 111 Ga. 622, 36 S. E. 821 (1900).

[40] See Bowlin v. Hekla F. Ins. Co., 36 Minn. 433, 31 N. W. 859 (1887); Shapiro v. Western, etc., Ins. Co., 51 Minn. 239, 53 N. W. 463 (1892); Shapiro v. St. Paul, etc., Ins. Co., 61 Minn. 135, 63 N. W. 614 (1895); Ermentrout v. Girard, etc., Ins. Co., 63 Minn. 305, 65 N. W. 635 (1895).

months' limitation.[41] Where the policy contained this provision and a further statement that no suit or action on the policy for the recovery of any claim should be sustainable in any court of law or equity until full compliance by the assured with this requirement, the court said:[42] "Under the stipulations in the policy there can be no question that, as a condition precedent to the payment of the loss, the proofs of loss should be submitted to the company within the time prescribed. The sufficiency of the proofs on the trial of the case is a question for the court, and to be sufficient they should show a loss within the terms of the policy." Although a failure to make proofs of loss within the stipulated time does not cause a forfeiture of the policy, it is necessary that proofs be submitted before an action can be maintained.[43]

§ 308. **What is compliance with this provision.**—Notice to an agent of the company a day or so after the loss occurs, with a request that he notify his principal, is immediate notice.[44] The requirement that a statement shall be "rendered" to the company within a specified time is complied with by mailing a statement to the company within the time.[45] Where there was proof of mailing the notice and proofs of loss, properly stamped and addressed, to the insured, which was opposed by declarations of the company's officers and clerks to the effect that the documents were never received, it was held that there was a question for the jury to determine.[46] It is sufficient if the

[41] Southern F. Ins. Co. v. Knight, 111 Ga. 622, 36 S. E. 821, 78 Am. St. 216 (1900).

[42] Cannon v. Phœnix Ins. Co., 110 Ga. 563, 78 Am. St. 124 (1900).

[43] German Ins. Co. v. Fairbank, 32 Neb. 750, 29 Am. St. 459 (1891); Western, etc., Ins. Co. v. Thorp, 48 Kan. 239, 28 Pac. 991 (1892).

[44] Burlington Ins. Co. v. Lowery, 61 Ark. 108, 54 Am. St. 196 (1895); Hoffecker v. New Castle, etc., Ins. Co., 5 Houst. (Del.) 101 (1875).

[45] Susquehanna, etc., Ins. Co. v. Tunkhannock Toy Co., 97 Pa. St. 424, 39 Am. Rep. 816 (1881); Badger v. Glens Falls Ins. Co., 49 Wis. 389 (1880); Manufacturers', etc., Ins. Co. v. Zeitinger, 168 Ill. 286, 61 Am. St. 105 (1897); Whitmore v. Dwelling House Ins. Co., 33 Am. St. 842 (1892), note. Under Iowa code, par. 23, § 48, providing that in computing time, if the last day falls on Sunday, the prescribed time shall be extended so as to include the whole of the following Monday, a proof of loss mailed on Saturday, the last day for making the same being Sunday, and received by the insurance company on Monday, was in time: McKibban v. Des Moines Ins. Co. (Iowa), 86 N. W. 38 (1901).

[46] Pennypacker v. Capital Ins. Co., 80 Iowa 56, 8 L. R. A. 236 (1890).

proofs are mailed within the time, although they are not received by the company until after the expiration of the period. "It is said that the clause in the policy, 'shall render a statement to the company,' means, shall render a statement to the company at its office; that the word 'render' has a different signification from 'forward' or 'mail;' and that the policy required the proofs to be actually delivered to the company at its own office within sixty days. We think such an interpretation of this provision too narrow and strained."[47] But in New York it is held that the proofs of loss must be mailed so that they may be received by the insurer within the time fixed by the policy.[48] Send-

[47] Manufacturers', etc., Ins. Co. v. Zeitinger, 168 Ill. 286, 48 N. E. 179 (1897); Pennypacker v. Capital Ins. Co., 80 Iowa 56, 8 L. R. A. 236 (1890).

[48] In Peabody v. Satterlee, 166 N. Y. 174, 59 N. E. 818, 52 L. R. A. 956 (1901), the court said: "A proper reading of the provision of the policy is that the insured is to furnish or deliver to the defendants these proofs of loss, and this clearly means that the papers shall be so furnished to the defendants personally, or to their duly authorized agent, if they have one. In cases of this kind substituted service, or service by mail, is either matter of statute or contract. In this case the contract is silent, and the depositing of the proofs of loss in the mail at Buffalo on the sixtieth day after the fire occurred can not be held a compliance with the provisions of the policy. This view was adopted by the trial court, but the appellate division reversed the judgment and ordered a new trial. The opinion of the appellate division, in part, is as follows: 'While there are numerous cases reported in which it is held that it is necessary to comply with the provisions of the clause requiring that proofs of loss shall be rendered to the attorneys of the underwriters within sixty days of a fire as a condition precedent to the right of recovery, we are unwilling to say as a matter of law that, where the plaintiff has complied with all the requirements of the policy within the time given him by its terms to act, and deposited it in the mails, he has forfeited his right to maintain an action for the recovery of the insurance for which he has paid the premiums.' The very question to be decided at this time is whether the plaintiff has complied with all the requirements of the policy within the time given him by its terms. If he has, he should recover; and, if he has not, this court, in deciding against him, declares no forfeiture of his legal rights, but construes a written contract according to its plain provisions. Policies of fire insurance have been before us many times for construction, and we have given effect to their provisions without regard to the fact that in the particular case it seemed to impose hardship and loss upon either the insurer or the insured: Blossom v. Lycoming F. Ins. Co., 64 N. Y. 162; Quinlan v. Providence, etc., Ins. Co., 133 N. Y. 356, 364, 365, 31 N. E. 31; McAllaster v. Niagara F. Ins. Co., 156 N. Y. 80, 50 N. E.

ing the estimates of carpenters as to what the building destroyed would cost is not furnishing proofs of loss.[49] A statement which describes in general terms the merchandise destroyed, and alleges that it was owned by the insured, and was of a specified value, and further states that the origin of the fire is unknown, but is supposed to have been caused by a flue, sufficiently complies with a statute which requires the insured to state the facts as to how the loss occurred so far as within his knowledge, and the extent of the loss, although such proof does not meet the requirements of the policy.[50] So, a written notice, accompanied by an affidavit stating that the origin of the fire is unknown to the insured, and that the loss is total, entire and complete, satisfies the provision in the policy which requires "satisfactory" proofs of loss, as well as this statute.[51]

§ 309. **Certificate of magistrate.**—The courts have generally sustained the validity of the requirement that the insured shall furnish, when required, a certificate of a magistrate or notary public living nearest the place of the fire stating that he has examined the circumstances and believes the insured has honestly sustained loss to the amount certified.[52] But the insured is under no obligation to

502. The use of the standard policy in this state was made compulsory in order to protect both parties to the contract of insurance from unnecessary and wasting litigations over questions having their origin in the varying forms of policies issued by the different companies. It is important alike to the insurer and insured that the standard policy should be fairly construed, in order that an instrument which came from the hands of its creators presenting many questions for construction be rendered clear and easily understood. In the case at bar the insured had nearly three weeks in which to correct his proofs after they were returned by the defendants, and it is due solely to his own negligence that they did not reach the company in time. It is far more important that there should be a clear and settled rule as to the manner of rendering proofs of loss than that plaintiff should recover in this particular case. The duty of the court in the premises is in no way affected by the fact that the defendants have seen fit to avail themselves of a technical defense."

[49] Heusinkveld v. St. Paul, etc., Ins. Co., 96 Iowa 224, 64 N. W. 769 (1895).

[50] Warshawky v. Anchor, etc., Ins. Co., 98 Iowa 221, 67 N. W. 237 (1896).

[51] Parks v. Anchor, etc., Ins. Co., 106 Iowa 402, 76 N. W. 743 (1898).

[52] Lane v. St. Paul, etc., Ins. Co., 50 Minn. 227, Woodruff Ins. Cas. 188 (1892). The Minnesota statute now forbids the insertion of this clause in a policy. See, also, Worsley v. Wood, 6 Term R. 710 (1796); London Guarantee Co. v. Fearnley, L. R. 5 App. Cas. 916 (1880).

furnish the certificate unless requested to do so, and a mere notice to him to comply with the conditions of the policy is not notice to furnish this certificate. The request must be made before suit is brought to recover the amount of the loss.[53] Courts will not attach much importance to slight differences in distance between different notaries.[54] Where the certificate furnished was that of a notary residing within four hundred feet of the fire, and it appeared that there was another notary who lived nearer, and the defect was not pointed out by the defendant until after the commencement of the suit, it was held that it was too late to make the objection.[55] It was held in Illinois that the certificate of a magistrate as to the amount of the loss is not conclusive on the insured, and that a party may, notwithstanding such certificate, show the true amount of the loss.[56] In some states the insertion of this provision in the policy is forbidden by statute, and in others it is held void and unenforceable.[57]

§ 310. **Plans and specifications.**—The requirement that the insured shall, if required, furnish verified plans and specifications of any buildings or fixtures destroyed or damaged is reasonable and must be complied with. Where the company requests the insured to make out plans and specifications and hold and deliver the same to a common adjuster of itself and other companies, it thereby waives the presentation of the plans and specifications to itself.[58]

§ 311. **Waiver.**—If the company objects to the proofs of loss on technical grounds it must specify the particular defect, if it is one which may be remedied, or it will be held to have waived the defect. Where a party in good faith attempts to make proofs of loss, the failure of the company to make any objection to the proofs is sufficient to constitute a waiver.[59] "The law is settled that where the assured, in attempting in good faith to comply with the terms

[53] Moyer v. Sun Ins. Office, 176 Pa. St. 579, 53 Am. St. 690 (1896); Johnson v. Phœnix Ins. Co., 112 Mass. 49, 17 Am. Rep. 65 (1873); Leadbetter v. Etna Ins. Co., 13 Me. 265, 29 Am. Dec. 505 (1836).

[54] Williams v. Niagara F. Ins. Co., 50 Iowa 561 (1879).

[55] Barnum v. Merchants' F. Ins. Co., 97 N. Y. 188 (1884).

[56] Birmingham F. Ins. Co. v. Pulver, 126 Ill. 329, 9 Am. St. 598 (1888); Kelly v. Sun Fire Office, 141 Pa. St. 10, 23 Am. St. 254 (1891).

[57] German, etc., Ins. Co. v. Norris, 100 Ky. 29 (1896).

[58] Brownfield v. Mercantile, etc., Ins. Co., 84 Mo. App. 134 (1900).

[59] Moyer v. Sun Ins. Office, 176 Pa. St. 579, 53 Am. St. 690 (1896).

of the policy, furnishes to the insurance company within the time stipulated what purports and is intended to be proofs of loss, the company must point out particularly any defects therein if it intends to rely upon them. If it fails to do so, objection can not thereafter be made to its sufficiency."[60] The mere silence of an agent or manager of the company after receiving proofs of loss is a waiver of the right to require further proofs.[61]

The company waives compliance with this provision of the policy by waiting until but two or three days are left within the limit, and then demanding of the insured, indiscriminately, proofs which he was unconditionally required to furnish, and those which he was not required to furnish unless demanded, and failing to state that he had less time to furnish the former than the latter, and that a failure to furnish the former within the time limited would result in a forfeiture.[62] Where the company denies all liability it is not necessary to furnish proofs of loss.[63] This is true where the denial is made to a third person during the period prescribed for making the proofs, if the fact of such denial comes to the knowledge of the insured.[64] But the fact that the insurer, when denying its liability on the policy and insisting that it was void, at the same time objected to the proofs of loss, does not amount to a waiver of the forfeiture.[65] An adjuster, by agreeing to accept the estimate of a third person as to the amount of the loss, waives the proofs of loss required under the policy.[66] Where the company holds the proofs without objection until forty-three days after receiving them, and until the time allowed by the policy for furnishing proofs has expired, it can not thereafter object to their sufficiency.[67] The refusal of an adjuster for the company to pay the amount of the loss on the ground that the insured had made false representations in the application for

[60] Schmurr v. State Ins. Co., 30 Ore. 29, 46 Pac. 363 (1896).

[61] Morotock Ins. Co. v. Cheek, 93 Va. 8, 57 Am. St. 782 (1896); McBryde v. South Carolina, etc., Ins. Co., 55 S. C. 589, 74 Am. St. 769 (1899).

[62] McCarvel v. Phenix Ins. Co., 64 Minn. 193, 66 N. W. 367 (1896).

[63] Soorholtz v. Marshall, etc., Ins. Co., 109 Iowa 522, 80 N. W. 542 (1899); American, etc., Ins. Co. v. Henninger, 87 Ill. App. 440 (1899).

[64] Merchants' Ins. Co. v. Nowlin (Tex.), 56 S. W. 198 (1900).

[65] Betcher v. Capital F. Ins. Co., 78 Minn. 240, 80 N. W. 971 (1899).

[66] Wholley v. Western Assur. Co., 174 Mass. 263, 54 N. E. 548 (1899).

[67] Fort Wayne Ins. Co. v. Irwin, 23 Ind. App. 53, 54 N. E. 817 (1899).

insurance, and that he was guilty of burning the house, is not a waiver of a condition requiring proofs of loss.[68] It is said in New York that an insurance agent can not waive the terms of the New York standard policy, and that where a party agrees to insure another and to issue a New York standard policy, but fails to do so, and after loss denies that any contract existed, it is not a waiver of proofs of loss.[69] The company was held to have waived proofs of loss where the local agent told the insured, at the time the general agent appraised the property after loss, that he need not make any proofs of loss, and that if he was not satisfied with the appraisement the company would make a new one.[70] The fact that the policy prohibits a waiver of the proofs of loss, either by the adjuster or the president of the company, does not prevent their acts after the loss from amounting to a waiver.[71] An agent with full power to adjust and pay claims against the company has authority to waive the provisions in the policy requiring the service of notice and proofs of loss, and the appointment of appraisers.[72] The company waives proofs of loss where the adjuster, after having a personal interview with the insured, who answers questions respecting the origin of the fire, refuses to pay the amount of the loss to an assignee of the policy because the property was mortgaged.[73] Where there is a waiver of proofs of loss by the company it inures to the benefit of the mortgagee where the policy is payable to him as his interest may appear.[74]

§ 312. **To whom notice must be given.**—The policy provides that notice and statement of loss shall be given to the company. This provision is complied with by giving notice and furnishing a statement to a duly authorized agent of the company.[75] It is held in Minnesota that it is not sufficient to give notice of loss to a local agent;[76] but where the notice is given to a local agent, who transmits it to his

[68] Phœnix Ins. Co. v. Minner, 64 Ark. 590, 44 S. W. 75 (1898).

[69] Hicks v. British, etc., Assur. Co., 162 N. Y. 284, 56 N. E. 743 (1900).

[70] McCoubray v. St. Paul, etc., Ins. Co., 64 N. Y. Supp. 112, 50 App. Div. (N. Y.) 416 (1900).

[71] Lake v. Farmers' Ins. Co., 110 Iowa 473, 81 N. W. 710 (1900).

[72] Smaldone v. President, etc., 162 N. Y. 580, 57 N. E. 168 (1900).

[73] Western Assur. Co. v. McCarty, 18 Ind. App. 449, 48 N. E. 265 (1897).

[74] State Ins. Co. v. Ketcham, 9 Kan. App. 552, 58 Pac. 229 (1899).

[75] Burlington Ins. Co. v. Lowery, 61 Ark. 108, 54 Am. St. 196 (1895).

[76] Ermentrout v. Girard, etc., Ins. Co., 63 Minn. 305, 56 Am. St. 481 (1895).

principal, it is a substantial compliance. In Iowa, evidence that notice and proofs of loss were sent to the firm through which the policy was procured, although not agents of the company, and that they forwarded the papers by mail to the company, is admissible for the purpose of showing that the company actually received the same.[77] Where the risks of the insuring company are reinsured under a contract whereby the reinsuring company assumes the management and control of the business of the original insurer, and agrees to assume, adjust and promptly pay its losses, proofs of loss under a policy issued by the original insurer may be made to the reinsuring company.[78] Apparent authority on the part of the local agent to receive proofs of loss is implied from a custom among insurance corporations to prepare proofs of loss and to send them to officers. "This policy," said Mr. Justice Morton,[79] "contained no provision as to the manner in which proofs of loss should be delivered to the company. If, therefore, the local agents had apparent authority, by custom or otherwise, to receive proofs of loss, we think that delivery to them would constitute delivery to the company, even if they had not authority from the nature of their agency to receive them, or if, also, in the absence of custom, a delivery to them under the circumstances would not have been a reasonable mode of sending proofs of loss to the company, on neither of which do we pass an opinion." In the same case it was held that a delivery of the proofs to a local agent is delivery to the company where the commission of the agent gives him "full power to receive proposals for insurance against loss or damage by fire, to receive moneys, countersign, issue, renew and consent to the transfer of policies subject to the rules and regulations of the company, and to such of their instructions as may from time to time be given by officers of the company." In Illinois a delivery of proofs of loss to a local agent of the insurer, in the absence of any provision in the policy to the contrary, is a delivery to the company for all the purposes of the policy.[80]

XVII. Exhibition of Property and Records—Examination of Party.

The insured, as often as required, shall exhibit to any person designated by this company all that remains of any property herein de-

[77] Pennypacker v. Capital Ins. Co., 80 Iowa 56, 8 L. R. A. 236 (1890).

[78] Whitney v. American Ins. Co., 127 Cal. 464, 59 Pac. 897 (1900).

[79] Harnden v. Milwaukee, etc., Ins. Co., 164 Mass. 382, 49 Am. St. 467 (1895).

[80] Insurance Co. v. Hope, 58 Ill. 75, 11 Am. Rep. 48 (1871).

scribed, and submit to examinations under oath by any person named by this company, and subscribe the same; and, as often as required, shall produce for examination all books of account, bills, invoices, and other vouchers, or certified copies thereof if originals be lost, at such reasonable place as may be designated by this company or its representative, and shall permit extracts and copies thereof to be made.[81]

§ 313. **Examination of party.**—After a loss it is made the duty of the insured, as often as required, to exhibit to any person designated by the company all that remains of the insured property and to submit to examination under oath, by any person named by the company. A general provision requiring the insured to submit to examination is valid,[82] although certain requirements in connection therewith, such as that the examination shall be held apart from all persons except the magistrate, have been questioned.[83] In one case the question whether the insured was, under the circumstances, required to submit to an examination was said to be a mixed question of law and fact, which would not be reviewed by a court of appeals.[84]

This provision is generally treated as a condition precedent to a recovery. In some cases a refusal is said to result in a forfeiture;[85] while others hold that it merely prevents a recovery upon the policy until there is a substantial compliance.[86]

The demand for an examination of the insured must be of such a character as to show that the company intends to require com-

[81] This provision is found in the standard policies of New York, New Jersey, Connecticut, Rhode Island, Michigan, Louisiana, Iowa, South Dakota, North Dakota, Wisconsin and North Carolina. The following provision is found in the standard policies of Massachusetts, Minnesota and Maine: "The company may also examine the books of account and vouchers of the insured, and make extracts from the same." New Hampshire adds the words, "and shall have access to the premises and property damaged."

[82] Gross v. St. Paul, etc., Ins. Co., 22 Fed. 74 (1884); Ætna Ins. Co. v. Simmons, 49 Neb. 811, 69 N. W. 125 (1896).

[83] McGraw v. Germania F. Ins. Co., 54 Mich. 145, 19 N. W. 927 (1884).

[84] Porter v. Traders' Ins. Co., 164 N. Y. 504, 52 L. R. A. 424 (1900), annotated.

[85] Fleisch v. Insurance Co., 58 Mo. App. 596 (1894); Gross v. St. Paul, etc., Ins. Co., 22 Fed. 74 (1884); Fire Ins. Co. v. Felrath, 77 Ala. 194, 54 Am. Rep. 58 (1894).

[86] Weide v. Germania Ins. Co., 1 Dill. (C. C.) 441 (1870); Commercial Bank v. Fire Ins. Co., 84 Wis. 12, 54 N. W. 109 (1893).

pliance with the provision; and, therefore, a mere expression of a "desire" that the insured be examined is not sufficiently explicit.[87] In a case where compliance with the condition was held to be a condition precedent to the right of recovery, the court said:[88] "Having used due diligence to notify the insured that they required the performance of this stipulation, they certainly ought not to be held to have waived its performance. If the insured has intentionally absented himself so that he can not be notified that the performance of the stipulation is required, he should be held to have had due notice. And if for any cause, whether by his fault or otherwise, he can not be notified, that may be his misfortune or the misfortune of those claiming under or through him, but is no reason for treating as inoperative an important stipulation which the defendants saw fit to require, and the assured to give, as a condition which was to be complied with before there could be any obligation to pay the loss."

Where the policy provides that the time and place of the examination shall be designated by the company, a statement by the company to the insured that it wanted an examination at a time and place convenient to him is not such a demand as to put him in default.[89]

The insured need not submit to an examination by an adjuster who has not to his knowledge been authorized to represent the company.[90] The examination must be held at the place where the loss occurred, and neither party can require that it shall be held elsewhere.[91] The insured need submit to but one complete examination,[92] and can be

[87] McGraw v. Germania F. Ins. Co., 54 Mich. 145 (1884); State Ins. Co. v. Maackens, 38 N. J. L. 564 (1876).

[88] Harris v. Phœnix Ins. Co., 35 Conn. 310, Woodruff Ins. Cas. 190 (1868); Niagara F. Ins. Co. v. Forehand, 169 Ill. 626 (1897), and cases therein cited.

[89] Ætna Ins. Co. v. Simmons, 49 Neb. 811, 69 N. W. 125 (1896).

[90] Scottish, etc., Ins. Co. v. Keene, 85 Md. 263, 37 Atl. 33 (1897). For further illustrations, see Aurora F. Ins. Co. v. Johnson, 46 Ind. 315 (1874); Dougherty v. German, etc., Ins. Co., 67 Mo. App. 526 (1896); Harris v. Phœnix Ins. Co., 35 Conn. 310 (1868).

[91] American, etc., Ins. Co. v. Simpson, 43 Ill. App. 98 (1890); Fleisch v. Insurance Co., 58 Mo. App. 596 (1894). Even where the stipulation is that the examination shall be at "such reasonable place as shall be designated" by the company, the examination must be at the place of the loss when that is as convenient for the company as elsewhere: Murphy v. Northern British, etc., Co., 61 Mo. App. 323 (1895).

[92] Moore v. Protection Ins. Co., 29 Me. 97, 48 Am. Dec. 514 (1848).

required to answer only material questions.[93] He is also entitled to have an attorney present at the examination.[94]

Where the policy provided that the insured should submit to an examination under oath by the agent of the company, and that fraud or false swearing would forfeit the policy, it was held that the policy was void, where, although the insured swore truthfully as to the actual loss, he swore falsely as to the persons from whom he had purchased the property, or as to the value of goods purchased from a certain firm, even though the false swearing was with no intent to deceive the defendant, but was for the purpose of deceiving other persons.[95]

§ 314. Failure to produce books.—The standard form contemplates the possible loss of books or other papers, and provides for the use of copies. In a recent case it appeared that the insured agreed to keep a set of books showing a complete record of the business transactions, including all purchases and sales both for cash and credit, together with the last inventory of said business, and in case of loss agreed and covenanted to produce said books and inventory,—"and in the event of failure to produce the same this policy shall be deemed null and void, and no suit or action at law shall be maintained thereon for any loss." It was held, under this provision, that a failure to produce the books and inventory means a failure to produce them if they are in existence when called for, or if they have been lost or destroyed by the fault, negligence or design of the insured.[96] "Under any other interpretation of the policies," said Mr. Justice Harlan, "the insured could not recover if the books and inventory had been stolen, or had been destroyed in some other manner than by fire, although they had been placed 'in some secure place not exposed to a fire' that would reach the store. If the plaintiffs had the right, under the terms of the policy, as undoubtedly they had, to remove their

[93] Titus v. Glens Falls Ins. Co., 81 N. Y. 410 (1880); Insurance Co. v. Weides, 14 Wall. (U. S.) 375 (1871); Porter v. Traders' Ins. Co., 164 N. Y. 504, 52 L. R. A. 424 (1900).

[94] American, etc., Ins. Co. v. Simpson, 43 Ill. App. 98 (1891); Thomas v. Burlington Ins. Co., 47 Mo. App. 169 (1891); Grigsby v. German Ins. Co., 40 Mo. App. 276 (1890).

[95] Claflin v. Franklin Ins. Co., 110 U. S. 81, 3 Sup. Ct. 507 (1883).

[96] Liverpool, etc., Ins. Co. v. Kearney, 180 U. S. 132, 21 Sup. Ct. 326 (1901), s. c. 94 Fed. 314, 36 C. C. A. 265 (1899); Sneed v. British, etc., Assur. Co., 73 Miss. 279, 18 So. 928 (1895).

books and inventory from the safe to some secure place not exposed to a fire which might destroy the building in which they carried on business, surely it was never contemplated that they should lose the benefit of the policies if, in so removing their books and inventory, they were lost or destroyed, they using such care on the occasion as a prudent man acting in good faith would exercise. A literal interpretation of the contracts of insurance might sustain a contrary view, but the law does not require such an interpretation. In so holding the court does not make for the parties a contract which they did not make for themselves. It only interprets the contract so as to do no violence to the words used and yet to meet the ends of justice."

§ 315. **The iron safe clause.**—The New York form of standard policy does not contain a provision requiring the insured to keep his books of account in a fireproof safe. Many policies, however, contain this provision, and a failure to comply with it precludes a recovery.[97] It must, however, be given a reasonable construction. The supreme court of the United States[98] recently considered a policy which contained the following provision: "The assured, under this policy, hereby covenants and agrees to keep a set of books showing a complete record of all business transacted, including all purchases and sales both for cash and credit, together with the last inventory of said business, and further covenants and agrees to keep such books securely locked in a fireproof safe at night and at all times when the store mentioned in this policy is not actually open for business, or in some secure place not exposed to a fire which would destroy the house where such business is carried on." While the building was threatened by fire one of the insured parties entered the building for the purpose of removing the books of the firm to a safe place. He opened the iron safe in the store in which they had been deposited for the night and took them to his residence, some distance away. In

[97] Gibson v. Missouri, etc., Ins. Co., 82 Mo. App. 515 (1900); Western Assur. Co. v. Redding, 68 Fed. 708 (1895); Niagara F. Ins. Co. v. Forehand, 169 Ill. 626, 48 N. E. 830 (1897). In Mechanics', etc., Ins. Co. v. Floyd, 20 Ky. L. 1538, 49 S. W. 543 (1899), it is held that a failure to comply with a provision in a policy in regard to the safe-keeping of a set of books and an inventory will not work a forfeiture of the policy, since such a provision is without consideration, does not decrease the risk, and, at the most, only tends to the better preservation of the evidence to show the amount of the loss sustained in case of fire.

[98] Liverpool, etc., Ins. Co. v. Kearney, 180 U. S. 132 (1901).

the hurry and confusion incident to removing the books the inventory was either left in the safe and destroyed, or was otherwise lost, and could not be produced after the fire. The other books were saved and exhibited to the insurer as required. It was not claimed that the loss of the inventory was due to fraud or bad faith, and the court charged the jury that the books which had been kept and which were produced on the trial were a substantial compliance with the terms of the policy. The company claimed a literal compliance with the words of the policy, and the court said: "It will be observed that the insured had the right to keep the books and inventory either in a fireproof safe or in some secure place not exposed to a fire that would destroy the house in which their business was conducted. But was it intended by the parties that the policy should become void unless the fireproof safe was one that was absolutely sufficient against every fire that might occur? We think not. If the safe was one such as was commonly used, and such as, in the judgment of prudent men in the locality of the property insured, was sufficient, that was enough within the fair meaning of the words of the policy. It can not be supposed that more was intended. If the company contemplated the use of a perfect safe in all respects and capable of withstanding any fire, however extensive and fierce, it should have used words expressing that thought. Nor do the words 'in some secure place not exposed to a fire which would destroy the house where said business is carried on' necessarily mean that the place must be absolutely secure against every fire that would destroy such house. If, in selecting a place in which to keep their books and last inventory, the insured acted in good faith and with such care as prudent men ought to exercise under like circumstances, it could not be reasonably said that the terms of the policy relating to that matter were violated."

"A 'fireproof' safe, in view of the situation of a small country merchant, and his needs for and employment of a safe, can only mean the usual fireproof safe used by the country generally,—a safe composed of incombustible materials and fitted to protect to the usual extent and in the ordinary way, books and papers deposited therein, and not that rare and costly structure, if, indeed, such there be, which is capable of withstanding successfully the action of fire altogether, and of preserving its contents from harm absolutely."[99]

Where the insured kept a complete set of books and inventories at

[99] Sneed v. British, etc., Assur. Co., 73 Miss. 279 (1895).

his dwelling house, located about seventy yards from the insured storehouse, all of which were produced for inspection, except a small cashbook which was accidentally left in the storehouse on the night of the fire, it was held that there was not a forfeiture of the policy, although it provided that he should keep his books, including his cashbook, in a place not exposed to a fire which would destroy the building.[100]

A policy contained a provision that the insured "shall take an inventory of stock hereby insured at least once a year during the life of this policy, and shall keep books of account, strictly detailing purchases and sales of said stock, and shall keep such inventory securely locked in an iron safe during the hours that the said store is closed for business. Failure to observe these conditions shall work a forfeiture of all claims under this policy." Reference was also made to the application, which was made a part of the policy. It was held that these provisions, which should be construed together, required the insured to take an inventory some time within a year after the policy was issued and thereafter to keep books as provided. The agreement to keep books was a promissory warranty, and failure to observe it rendered the policy voidable; and if the company knew that the condition was not being complied with, and took no steps to forfeit the policy, it could not, after the loss, be heard to say that by reason of the failure to observe the condition the policy was void.[101]

Where the insured agreed to keep the books connected with his saloon business in a fireproof safe or other secure place "at night," and at all times when the place was not actually open for business, he can not recover on the policy where the books were kept under the counter instead of in the safe, although the place was open all night.[102]

The provision requiring the books to be kept in a fireproof safe is waived by the statement of an adjuster that the insured would have to get duplicates for certain invoices in order to make the required proofs of loss, whereby the insured was induced, at considerable expense and trouble, to secure such duplicates.[103]

[100] Niagara F. Ins. Co. v. Heflin (Ky.), 60 S. W. 393 (1901).

[101] Hanover F. Ins. Co. v. Dole, 20 Ind. App. 333, 50 N. E. 772 (1898).

[102] Southern Ins. Co. v. Parker, 61 Ark. 207, 32 S. W. 507 (1895).

[103] Corson v. Anchor, etc., Ins. Co. (Iowa), 85 N. W. 806 (1901). In Northwestern, etc., Ins. Co. v. Mize (Tex. Civ. App.), 34 S. W. 670 (1896), it was held that the knowledge of an agent who states to the

XVIII. Arbitration of the Amount of Loss.

In the event of disagreement as to the amount of loss the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall first select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and, failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine the amount of such loss; the parties thereto shall pay the appraiser respectively selected by them and shall bear equally the expenses of the appraisal and umpire.[104]

insured that it will not be necessary for him to have an iron safe, or to keep a set of books, although the policy contained such a provision, is not binding on the company where the policy also provides that no agent shall have power to waive any of the provisions of the policy except in writing attached to the policy. In German Ins. Co. v. Amsbaugh, 8 Kan. App. 197, 55 Pac. 481 (1898), it was held that an inventory of goods taken six and one-half years before the fire, shown to be a correct inventory as to quantities and values, is competent evidence in connection with books of account duly kept and proven to show purchases and sales of goods made from the day of the inventory to the fire. It further appeared that other evidence tending to show the value of the stock had been destroyed by the fire.

[104] See also, *XX. Time Within Which Loss is Payable*, p. 357. This provision is found in the standard policies of New York, New Jersey, Rhode Island, Connecticut, Louisiana, South Dakota, North Dakota and North Carolina. The Michigan provision provides that the award of the appraisers shall be "*prima facie* evidence of the amount of such loss." Iowa adds, "and unless such proofs, declarations and certificates are produced, and examinations had and appraisals permitted, and an award made, when this company has elected to appraise, the loss shall not be payable," it being also provided that an appraisal shall be had "upon written notice to the insured of the company's election to determine the amount of the loss by appraisal." The Wisconsin clause is as follows: "In the event of disagreement in the amount of the loss the same shall, as above provided, be ascertained by two competent and disinterested appraisers, who shall be residents of this state, unless otherwise agreed by the parties hereto, the insured and this company each selecting one within thirty-five days after the mailing of proof of loss to the company, as herein stated, and in case either party fails to select an appraiser within such time the other appraiser and the umpire selected, as hereinbefore provided, may act as a board of appraisers, and whatever award they shall find shall be as binding as though the two appraisers had been chosen, and the two so chosen shall first select a

§ 316. **Disagreement.**—Before this provision of the policy can be invoked it must appear that there is a real disagreement between the insurer and the insured.[105] Hence, a mere general objection to a statement of the loss without pointing out the items excepted to will not constitute a failure to agree, and will not make a case for arbitration.[106] A provision making an award a condition precedent to the commencement of an action upon the policy presupposes a failure to agree and consequent arbitration.[107] Where the company, after

competent and disinterested umpire, provided that if after five days the two appraisers can not agree on such umpire, the presiding judge of the circuit court wherein the loss occurs may appoint such an umpire upon application of either party in writing by giving five days' notice thereof in writing to the other party. Unless within thirty days after proof of the loss has been mailed to the company, either party, the assured or the company, shall have notified the other in writing that such party demands an appraisal, such right of appraisal shall be waived." The remainder of the clause follows the New York form. The Massachusetts and Maine policies provide that: "In case of loss under this policy, and a failure of the parties to agree as to the amount of the loss, it is mutually agreed that the amount of such loss shall be referred to three disinterested men, the company and the assured each choosing one out of three persons, to be named by the other, and the third being selected by the two so chosen; the award in writing by a majority of the referees shall be conclusive and final upon the parties as to the amount of the loss or damage, and such reference, unless waived by the parties, shall be a condition precedent to any right of action in law or equity to recover for such loss; but no person shall be chosen or act as referee against the objection of the other party, who has acted in like capacity within four months." The provision in the Minnesota standard policy is similar to the above, but does not permit an appraisement in cases of total loss on buildings. The New Hampshire policy provides that: "In case difference of opinion shall arise as to the amount of any loss under this policy other than on buildings totally destroyed, unless the company and the assured shall, within fifteen days after notice of loss, mutually agree upon referees to adjust the same, either party may, upon giving written notice to the other, apply to a justice of the supreme court, who shall appoint three referees, one of whom shall be thoroughly acquainted with the kind of property to be considered, and their award in writing, after proper notice and hearing, shall be final and binding on the parties. The referees' fees shall be equally divided between the company and the insured."

[105] American F. Ins. Co. v. Stuart (Tex.), 38 S. W. 395 (1896).

[106] Hickerson v. German, etc., Ins. Co., 96 Tenn. 193, 32 L. R. A. 172 (1896).

[107] Vangindertaelen v. Phenix Ins. Co., 82 Wis. 112 (1892); Boyle v.

receiving proofs of loss, disputes the amount and demands an arbitration, there is a disagreement within the meaning of the provision.[108] A disagreement merely as to the basis of estimating the loss does not bring the arbitration provision into effect.[109]

§ 317. **Validity of provision.**—This form of policy provides for the determination of the amount of the loss by arbitrators. As thus restricted it is almost universally held valid and binding upon the parties.[110] Nebraska seems to be the only state in which a provision for arbitration of this character is not sustained.[111]

The effect of an arbitration under this provision does not determine the liability of the company.[112] It is equally well settled that the parties can not, by contract, oust the jurisdiction of the courts; and a provision which requires the submission of any and all differences between the parties to arbitration is invalid and unenforceable.[113]

A provision for arbitration as thus limited furnishes a speedy, convenient and inexpensive mode of ascertaining the loss or damage of the insured if he is entitled to recover; and it is not open to the objection that it tends to oust the courts of their rightful jurisdiction. Under it the right of recovery is left open, and the appraisal serves only to liquidate and determine the amount of the loss or damage.

Provisions for arbitration should not be subjected to a narrow or technical construction, but should be construed liberally in favor of

Hamburg, etc., Ins. Co., 169 Pa. St. 349 (1895); Farnum v. Phœnix Ins. Co., 83 Cal. 246 (1890); Chapman v. Rockford Ins. Co., 89 Wis. 572, 28 L. R. A. 405 (1895).

108 Phœnix Ins. Co. v. Carnahan, 63 Ohio St. 258, 58 N. E. 805 (1900). See Ætna F. Ins. Co. v. Davis (Ky.), 55 S. W. 705 (1900).

109 Virginia, etc., Ins. Co. v. Cannon, 18 Tex. Civ. App. 588, 45 S. W. 945 (1898).

110 Scott v. Avery, 5 H. L. Cas. 811 (1856); Fischer v. Merchants' Ins. Co. (Me.), 50 Atl. 282 (1901); Phœnix Ins. Co. v. Carnahan, 63 Ohio St. 258, 58 N. E. 805 (1900); Hamilton v. Home Ins. Co., 137 U. S. 370 (1890); Reed v. Washington, etc., Ins. Co., 138 Mass. 572 (1885); Straker v. Phenix Ins. Co., 101 Wis. 413, 77 N. W. 752 (1898); Hobkirk v. Phœnix Ins. Co., 102 Wis. 13, 78 N. W. 160 (1899).

111 National, etc., Acc. Ass'n v. Burr, 44 Neb. 256 (1895).

112 Smith v. Herd (Ky.), 60 S. W. 841, 1121 (1901).

113 Supreme Council v. Forsinger, 125 Ind. 52, 9 L. R. A. 501 (1890); Fox v. Masons', etc., Acc. Ass'n, 96 Wis. 390, Woodruff Ins. Cas. 197 (1897); Raymond v. Farmers', etc., Ins. Co., 114 Mich. 386 (1897); Scott v. Avery, 5 H. L. Cas. 811 (1856); Chapman v. Rockford Ins. Co., 89 Wis. 572, 62 N. W. 422 (1895).

the insured. "It should be noted that the condition alleged to be violated in this case applies only after the capital fact of a loss. The object of the provision was to prescribe the manner in which an accrued loss was to be adjusted and ascertained. The liability of the defendant having become fixed by the happening of the event upon which the contract was to mature, conditions which prescribe methods and formalities for ascertaining the extent of it or for adjusting it, are not to be subjected to any narrow or technical construction, but construed liberally in favor of the insured."[114]

The rules governing arbitration apply to mutual as well as other insurance companies.[114a]

A by-law of a mutual insurance association which requires the presentation of claims to certain officers of the company, and, if their decision is adverse to the claimant, that an appeal must be taken to the governing body, whose decision shall be final, is valid in so far as the provision for appeal is concerned, and void so far as it attempts to oust the jurisdiction of the courts. The claimant, after having taken the required appeal to the governing body, may maintain an action in the courts to enforce his claim.[115] Where the constitution of a mutual benefit association provided that "all questions, whether of law or of fact, appertain to the sole jurisdiction of this lodge and the authorities of this order, and their decision in the premises shall be binding," the supreme court of California said:[116] "The society has many of the features of an organized charity, and it has been said that the claim for a sick benefit is not a property right. In short, the rules of law have not been applied to these institutions with the same strictness with which they have been applied to corporations organized for profit.[117] In an ordinary case I should be loath to hold that a man can effectually waive his right to sue in a court of law before his right of action has arisen, or that he can in advance agree to an

[114] Porter v. Traders' Ins. Co., 164 N. Y. 504, 52 L. R. A. 424 (1900). See Montgomery v. American, etc., Ins. Co., 108 Wis. 146, 84 N. W. 175 (1900), and Moyer v. Sun Ins. Office, 176 Pa. St. 579 (1896) [different provisions relating to arbitration and appraisal construed].

[114a] Fox v. Masons', etc., Acc. Ass'n, 96 Wis. 390, 71 N. W. 363, Woodruff Ins. Cas. 197 (1897).

[115] Supreme Council v. Forsinger, 125 Ind. 52, 9 L. R. A. 501 (1890).

[116] Robinson v. Templar Lodge, 117 Cal. 370, 49 Pac. 170 (1897).

[117] Rood v. Railway, etc., Ass'n, 31 Fed. 62 (1887); Van Poucke v. Netherland, etc., Soc., 63 Mich. 378 (1886); Canfield v. Great Camp, etc., 87 Mich. 626, 24 Am. St. 186 (1891).

arbitration, but it has been so held with reference to these mutual benefit societies, and, with reference to them, I think the regulation reasonable. But, even if this view were not correct, there can be no doubt of the proposition that he must first exhaust all the remedies afforded within the order before he can maintain an action at law. No such fact is averred in the complaint, and, as I understand the record, although previous application had been made for the benefits which had accrued before the time during which the benefits here sued for accrued, there is no evidence which tended to show that any application at all had been made to the lodge for the amounts here sued for. The authorities all seem to hold that this resource must be first exhausted."[118]

§ 318. **Where there is a total loss.**—All provisions in a policy in conflict with a valued policy statute are void, and hence a provision for the appointment of arbitrators in case of loss is ineffective where the property is wholly destroyed. In such case there can be nothing which can properly be submitted to arbitration.[119] Where the total insurance, exclusive of the foundation of the building, is less than its insurable value as designated by the insurer in the policy, it is not, under the provision of the Minnesota valued policy law, necessary for the insured to submit to arbitration, although the foundation is included in the description of the property.[120]

By consenting to arbitrate the amount of the loss in pursuance of a provision in a policy, the insured is not precluded in a subsequent suit on the policy from claiming to recover for a total loss if the evidence sustains the claim. In a recent case in Ohio it appeared that the question of loss was submitted to arbitrators, and the insured being dissatisfied with the award, and claiming that there was a total loss, refused to accept the amount awarded and brought suit upon the policy. The company denied that there was a total loss, and insisted upon the provisions of the arbitration. The court said:[121] "The

[118] Levy v. Magnolia Lodge, 110 Cal. 297 (1895); Robinson v. Irish, etc., Soc., 67 Cal. 135 (1885).

[119] German Ins. Co. v. Eddy, 37 Neb. 461, 19 L. R. A. 707 (1893). The submission to arbitration of the amount of the loss is not a waiver of the benefits of the statute making the amounts stated in the policy the measure of damages: Seyk v. Millers', etc., Ins. Co., 74 Wis. 67, 3 L. R. A. 523 (1889); Merchants' Ins. Co. v. Stephens, 22 Ky. L. 999, 59 S. W. 511 (1900).

[120] Ohage v. Union Ins. Co., 82 Minn. 426, 85 N. W. 212 (1901).

[121] Pennsylvania F. Ins. Co. v. Drackett, 63 Ohio St. 41, 57 N. E. 962 (1900).

section referred to requires a company insuring any building or structure against fire to cause such structure or building to be examined by an agent, who is required to make a full description of the building or structure and fix its insurable value, and then provides that in the absence of any change increasing the risk without its consent, or any intentional fraud on the part of the insured, in case of total loss, the whole amount stated in the policy on which it receives premiums shall be paid by the company, and in case of a partial loss, the full amount of such loss shall be paid. Statutes similar in their provisions are common to many of the states of the Union, and it is generally agreed that they rest on grounds of public policy—the prevention of the mischief incident to overinsurance,—and that the insured can not be held to a waiver of them.[124] It does not necessarily follow from this that where there is a partial loss it may not be ascertained by arbitrators; and where there is a clause in a policy requiring arbitration the parties may be required to conform to it. But, where the insured insists that the loss is total, the agreement to arbitrate, or an arbitration had fixing the amount, will not preclude him from bringing a suit as for a total one; and in such cases, if he establishes that there was a total one, he is entitled to recover the full amount of the policy, notwithstanding the award of the arbitrators was to the contrary, and fixed a less amount as the measure of the loss. But, on the other hand, should he fail in establishing a total loss, the amount of the recovery will be limited to the amount of the award where there was no fraud in obtaining it."

§ 319. **Demand for arbitration.**—Where arbitration is provided for on the request of one of the parties, it becomes imperative only after such request is made.[125] If neither party avails himself of the right to arbitrate, it is waived, and an action may be maintained upon the

[124] Insurance Co. v. Leslie, 47 Ohio St. 409, 24 N. E. 1072 (1890); Seyk v. Millers', etc., Ins. Co., 74 Wis. 67, 41 N. W. 443 (1889); St. Clara, etc., Academy v. Delaware Ins. Co., 98 Wis. 257, 73 N. W. 767 (1898); Havens v. Germania F. Ins. Co., 123 Mo. 403, 27 S. W. 718, 26 L. R. A. 107 (1894); White v. Connecticut, etc., Ins. Co., 4 Dill. (C. C.) 177 (1877); German F. Ins. Co. v. Eddy, 36 Neb. 461, 54 N. W. 856, 19 L. R. A. 707 (1893); Reilly v. Franklin Ins. Co., 43 Wis. 449 (1877).

[125] In Davis v. Anchor, etc., Ins. Co., 96 Iowa 70, 64 N. W. 687 (1895), the policy provided for arbitration at the "written request of either party," and that no action should be brought until after the award. It was held that arbitration was not a condition precedent to an action in the absence of a request. But see Probst v. Insurance Co., 64 Mo. App. 484 (1896); Murphy v. North British, etc., Ins. Co., 61 Mo. App. 323 (1895).

policy.[126] Policies contain different provisions in this respect. Under the New York form either party has the right to require an appraisal when there is a disagreement as to the amount of the loss. It is not the duty of the insured to initiate an appraisal, as an appraisal is a condition precedent to recovery only when one "has been required" by the insurer.[126a] In Kentucky it was said that the insured need not plead or prove performance of the provision for arbitration, as it is the duty of the company to propose arbitration in case of disagreement.[127] In Iowa, provisions in a policy that an appraisal by arbitrators shall be made if there be a disagreement as to the loss, and "that the loss shall not be payable until sixty days after notice and satisfactory proofs of loss have been given, including an award by appraisers when an appraisal has been required, and that no action on the policy can be maintained without full compliance by the assured with all the foregoing requirements," does not make an appraisal a condition precedent to the right to sue where the company makes no demand therefor.[128] In a Massachusetts case it appeared that the policy provided for a submission to arbitrators, in case of a loss, "at the written request of either party," and that no suit or action could be maintained until after such award. It was held that no right of action existed prior to an arbitration or its waiver, and that the policy could not be construed as making a written request for arbitration necessary, in case of a difference as to the amount of the loss, in order to prevent the immediate institution of an action. The court recognized the right of either party to an arbitration, but, on the facts and the language of the policy, held that an arbitration, not having been demanded, must be held to have been waived.[129]

[126] Nurney v. Fireman's Fund Ins. Co., 63 Mich. 633, 6 Am. St. 338 (1886); Garrettson v. Merchants', etc., Ins. Co. (Iowa), 86 N. W. 32 (1901).

[126a] Chainless Cycle Mfg. Co. v. Security Ins. Co. (N. Y.), 62 N. E. 392 (1901); Silver v. Assurance Co., 164 N. Y. 381, 58 N. E. 284 (1900).

[127] Sun, etc., Ins. Co. v. Crist, 19 Ky. L. 305, 39 S. W. 837 (1897).

[128] Lesure Lumber Co. v. Mutual F. Ins. Co., 101 Iowa 514, 70 N. W. 761 (1897). To the same effect, see Germania F. Ins. Co. v. Stewart, 13 Ind. App. 627, 42 N. E. 286 (1895); National Home, etc., Ass'n v. Dwelling House Ins. Co., 106 Mich. 236, 64 N. W. 21 (1895); Davis v. Atlas Assur. Co., 16 Wash. 232, 47 Pac. 436, 885 (1896); Sun, etc., Ins. Co. v. Crist, 19 Ky. L. 305, 39 S. W. 837 (1897); Stephens v. Union Assur. Soc., 16 Utah 22, 67 Am. St. 595 (1897).

[129] Hutchinson v. Liverpool, etc., Ins. Co., 153 Mass. 143, 10 L. R. A. 558 (1891), annotated.

In a well considered case in the circuit court of appeals[130] the insurance company contended that it was the duty of the insured to take the initiative and demand an arbitration; but the court said: "Each party is entitled to demand a reference, but neither can compel it, and neither has the right to insist that the other shall first demand it, and shall forfeit any right by not doing so. If the company demands it, and the insured refuses to arbitrate, his right of action is suspended until he consents to an arbitration; and if the insured demands an arbitration, and the company refuses to accede to the demand, the insured may maintain a suit on the policy notwithstanding the language of the twelfth section of the policy; where neither party demands an arbitration, both parties thereby waive it. The clause is to be construed the same as if it read, 'upon the request of either party.' These words, or their equivalent, are commonly found in similar clauses in policies of fire insurance, and they are necessarily and plainly implied in this policy. This is the interpretation placed upon the policy of a defendant in error, identical with the one here in suit, by the supreme court of Montana. That court, construing a clause in a policy declaring that no suit thereon should be sustainable until after an award, says this provision 'will come into action to bar the plaintiff's recovery where he has refused to arbitrate after a matter for arbitration arose, and the same was seasonably sought in conformity with the terms of the policy.'"

Where the policy provided that, in the event of a disagreement as to the amount of damages, the matter should, "at the written request of either party, be submitted to the judgment of two competent persons, to be mutually appointed by the assured and the company," and further, that no suit should be sustainable in a court of law or chancery until after an award should have been obtained in the manner provided, the court said: "Arbitration becomes imperative only after a written request for one has been made. The request, as it stands in this policy, is optional with either party, and, neither of them having availed themselves of the right to arbitrate, it must be deemed waived by both, and in such case the plaintiff was left to the mode of redress provided by law."[131] So, where the policy provided for

[130] Kahnweiler v. Phenix Ins. Co., 67 Fed. 483, 14 C. C. A. 485 (1895); approved in Western Assur. Co. v. Decker, 98 Fed. 381, 39 C. C. A. 383 (1899).

[131] Nurney v. Fireman's Fund Ins. Co., 63 Mich. 633, 30 N. W. 350 (1886).

arbitration "at the written request of either party," the court said:[132] "It is either optional and voluntary, or the duty rests upon each alike to make such written request, and in this case both parties have neglected such duty alike, and neither party can complain of the neglect of the other."

So, in Pennsylvania, it was said:[133] "It was the right of either party to demand an arbitration, and it was the right of either party to waive it; and the defendant, having made no such demand, must be presumed to have waived it." The party entitled to arbitration must make his demand within a reasonable time.

Where no demand was made within five months after loss, the right was held to have been waived.[134] In Ohio, it was said:[135] "It will be observed that this policy imposes no obligation on the insured to furnish an award of appraisers except 'when appraisal has been required.' That requirement certainly should be made within a reasonable time after proof of loss, and, if not so made before suit, is no obstacle to the maintenance of the action. In other words, a demand by the insurer for an appraisal within a reasonable time after proof of the loss has been furnished is, under such a policy, a condition precedent to the right to require the insured to furnish an award of appraisers." Where either party is entitled to arbitration upon demand, the presentation of a builder's affidavit as to the amount of the loss, and a waiver by the company of formal proofs, does not constitute such a demand.[136]

§ **320. Condition precedent.**—The parties may agree that no right of action shall arise against the insurer until the amount of the loss has been determined by arbitrators. Hence, where the policy contains a provision to the effect that "such reference, unless waived by the parties, shall be a condition precedent to any right of action in

[132] Phœnix Ins. Co. v. Badger, 53 Wis. 283, 10 N. W. 504 (1881).

[133] Wright v. Susquehanna, etc., Ins. Co., 110 Pa. St. 29, 20 Atl. 716 (1885).

[134] Gere v. Council Bluffs Ins. Co., 67 Iowa 272 (1885).

[135] Grand Rapids F. Ins. Co. v. Finn, 60 Ohio St. 513, 54 N. E. 545 (1899); Lesure Lumber Co. v. Mutual F. Ins. Co., 101 Iowa 514 (1897); Germania F. Ins. Co. v. Stewart, 13 Ind. App. 627, 42 N. E. 286 (1895); National Home, etc., Ass'n v. Dwelling House Ins. Co., 106 Mich. 236, 64 N. W. 21 (1895); Davis v. Atlas Assur. Co., 16 Wash. 232, 47 Pac. 436 (1897); Sun, etc., Ins. Co. v. Crist, 19 Ky. L. 305, 39 S. W. 837 (1899).

[136] Hutchinson v. Liverpool, etc., Ins. Co., 153 Mass. 143, 10 L. R. A. 558 (1890).

law or in equity to recover for such loss," no right of action exists until the condition has been complied with.[137]

But a provision for arbitration is not a condition precedent to the right to maintain an action on a policy to recover for loss thereunder, unless clearly made so by the terms of the policy.[138] If this intention does not appear the provision is simply a collateral agreement, and compliance therewith is not necessary before the bringing of an action. Arbitration under such circumstances is optional with the parties, and either may decline to arbitrate.[139] In a recent case in Iowa, Mr. Justice Ladd said:[140] "There is nothing in the policy making submission to arbitration a condition precedent to the payment of the loss or to the maintenance of an action, nor can such a condition be inferred from its terms. The authorities recognize the rule, as stated by Sir George Jessel, M. R., '(1) where the action can

[137] Hamilton v. Liverpool, etc., Ins. Co., 136 U. S. 242 (1890); Gasser v. Sun Fire Office, 42 Minn. 315 (1890); Levine v. Lancashire Ins. Co., 66 Minn. 138, 68 N. W. 855 (1896); Mosness v. German, etc., Ins. Co., 50 Minn. 341 (1892); Fischer v. Merchants' Ins. Co. (Me.), 50 Atl. 282 (1901).

[138] Hamilton v. Home Ins. Co., 137 U. S. 370, Woodruff Ins. Cas. 194 (1890).

[139] Grand Rapids F. Ins. Co. v. Finn, 60 Ohio St. 513, 71 Am. St. 736 (1899); Birmingham F. Ins. Co. v. Pulver, 126 Ill. 329, 9 Am. St. 598 (1888); Sergent v. Liverpool, etc., Ins. Co., 155 N. Y. 349 (1898); McNally v. Phœnix Ins. Co., 137 N. Y. 389 (1893); Davis v. Atlas Assur. Co., 16 Wash. 232 (1896); National Home, etc., Ass'n v. Dwelling House Ins. Co., 106 Mich. 236 (1895); Continental Ins. Co. v. Wilson, 45 Kan. 250, 23 Am. St. 720 (1891); Garrettson v. Merchants', etc., Ins. Co. (Iowa), 86 N. W. 32 (1901); Chapman v. Rockford Ins. Co., 89 Wis. 572, 62 N. W. 422, 28 L. R. A. 405 (1895); Phœnix Ins. Co. v. Carnahan, 63 Ohio St. 258, 58 N. E. 805 (1900) [citing Old Saucelito, etc., Co. v. Commercial, etc., Assur. Co., 66 Cal. 253, 5 Pac. 232 (1884); Uhrig v. Williamsburgh, etc., Ins. Co., 101 N. Y. 362, 4 N. E. 745 (1886); Hamilton v. Home Ins. Co., 137 U. S. 370 (1890)]; Randall v. American F. Ins. Co., 10 Mont. 340, 24 Am. St. 50 (1891).

[140] Read v. State Ins. Co., 103 Iowa 307, 72 N. W. 665, 64 Am. St. 180 (1897). In Zalesky v. Home Ins. Co., 102 Iowa 613, 71 N. W. 566 (1897), the policy, after providing for arbitration, provided that "no suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements." The court said: "Nor, in the absence of statute provisions to the contrary, can it be doubted that, under a policy containing provisions like the one involved in this action, an appraisement is a condition precedent to the bringing of an action on the policy." (Citing numerous cases.)

only be brought for the sum named by the arbitrator; (2) where it is agreed that no action shall be brought until there has been an arbitration, or that arbitration shall be a condition precedent to the right of action. In all other cases, where there is, first, a covenant to pay, and, secondly, a covenant to refer, the covenants are distinct and collateral, and the plaintiff may sue on the first, leaving the defendant to bring an action for not referring.' This court has recognized the right of parties to bind themselves to make payment of a sum to be fixed or estimated by an arbitrator or third person. Also, the right to make arbitration a condition precedent to the maintenance of an action. A mere provision in the policy, however, that, in event of a disagreement, the amount of the damage shall be ascertained by arbitrators, will not prevent the assured from maintaining an action, unless arbitration is made by the terms of the policy or necessary inference therefrom a condition precedent. In such a case the agreement to arbitrate is collateral to the main purposes of the policy,—an independent agreement,—a breach of which, while it will support a separate action, can not be pleaded in bar to a suit on the principal contract."

In a later case, the same court said:[141] "This policy does not in express terms prohibit the bringing of an action until an arbitration is had; but it does provide that, when the parties can not agree, the loss shall be determined by arbitration, and that the sum for which the company is liable 'shall be payable sixty days' thereafter; and in another place it provides that 'until sixty days after the * * * award and appraisal herein required shall have been rendered, the loss shall not be payable.' These provisions of the policy clearly imply that the loss is not due or payable until sixty days after the appraisement or award is returned. If the loss is not payable until such time, it is equally clear that suit can not be maintained until sixty days after the award is returned. Under the wording of this policy, we think that an appraisement and an award was a prerequisite to the maintenance of an action unless it was waived, or submission and award was prevented by the acts of the defendant."

In a leading case in the supreme court of the United States, it was held that a provision in a policy, that "in case differences shall arise touching any loss or damage after proof thereof has been re-

[141] George Dee & Sons Co. v. Key City F. Ins. Co., 104 Iowa 167, 73 N. W. 594 (1897).

ceived in due form, the matter shall, at the written request of either party, be submitted to arbitrators, whose award in writing shall be binding on the parties as to the amount of such loss or damage, but shall not decide the liability of the company under this policy," can not be pleaded in bar of an action on the policy unless it is further provided that no such action shall be brought until after the award.[142]

Where the provision was that "no suit or proceeding at law or in equity shall be brought to recover any sum herein, unless the same has been referred to the arbitration of just and competent men," and there was no reference and no request for the same, it was said:[143] "The promise is not to pay the award, but a sum named, and the proviso does not make an award a condition precedent to the promise to pay, but to the mode of enforcing that promise. It is well settled that such an agreement is not a bar to an action on the promise."

The New Hampshire form, which provides for a compulsory reference, does not require arbitration as a condition precedent to an action on the policy, although a statute permits a suit to be brought by the insured if not satisfied with the adjustment made by the insurer.[144]

Even though the provision for arbitration is made a condition precedent to the bringing of an action by the insured, he can not be deprived of his right of action by the misconduct of the insurance company. Thus, a refusal by the arbitrator appointed by the company to appoint an umpire, which virtually amounts to a refusal to proceed with the appraisal, will prevent the company from objecting that the action was brought before the appraisement was concluded.[145] So, a party whose duty it is to choose an arbitrator must choose one who will act with reasonable promptness in naming an umpire, or, on his failure to do so, replace him with another. A party to a controversy who is without fault can not be made to suffer through the inaction of the other party.[146]

[142] Hamilton v. Home Ins. Co., 137 U. S. 370 (1890).

[143] Badenfeld v. Massachusetts, etc., Acc. Ass'n, 154 Mass. 77, 13 L. R. A. 263 (1891); Reed v. Washington, etc., Ins. Co., 138 Mass. 572 (1885), and cases cited.

[144] Franklin v. New Hampshire F. Ins. Co., 70 N. H. 251, 47 Atl. 91 (1900).

[145] Brock v. Dwelling House Ins. Co., 102 Mich. 583, 26 L. R. A. 623 (1894).

[146] Read v. State Ins. Co., 103 Iowa 3υ7, 64 Am. St. 180 (1897).

§ 321. Revocation.—A party may not at his own option or volition revoke an arbitration or submission clause any more than he may the other provisions of the contract.[147] But a contrary view obtains in Pennsylvania in cases where the persons who are to make the appraisal or award are not named in the contract, but are to be chosen thereafter by the parties.[148]

§ 322. Invalidity of the award.—An award is binding upon the parties, unless it is invalid, and the burden of proof is upon the party asserting its invalidity.[149] Before an award made by arbitrators can be set aside and declared null and void, it must clearly appear that the arbitrators who made the award were guilty of misconduct, partiality or fraud.[150]

In an action brought to set aside an award and appraisement, made under the usual provision in the policy, it was said:[151] "An agreement of appraisal is a contract. Appraisers who make an award under such an agreement are presumed to have acted in accordance with all the terms of the contract, and the burden of proof is on those who attack their award to establish the contrary by convincing evidence. Every reasonable intendment and presumption is in favor of the award, and it should not be vacated unless it clearly appears that it was without authority, or was the result of fraud or mistake, or of the misfeasance or malfeasance of the appraisers."

Hence, where there are two methods by which a result may have been reached by arbitrators, one of which was legal and authorized, and the other illegal and unauthorized, the presumption is that the legal method was followed.[152]

[147] Chapman v. Rockford Ins. Co., 89 Wis. 572, 62 N. W. 422, 28 L. R. A. 405 (1895); American, etc., Ins. Co. v. Landau (N. J. Eq.), 49 Atl. 738 (1901).

[148] Commercial, etc., Assur. Co. v. Hocking, 115 Pa. St. 407 (1886); Mentz v. Armenia F. Ins. Co., 79 Pa. St. 478, 21 Am. Rep. 80 (1875).

[149] Springfield, etc., Ins. Co. v. Payne, 57 Kan. 291, 46 Pac. 315 (1896).

[150] Hartford F. Ins. Co. v. Bonner Merc. Co., 44 Fed. 151, 11 L. R. A. 623 (1890).

[151] Barnard v. Lancashire Ins. Co., 101 Fed. 36, 41 C. C. A. 170 (1900); Karthaus v. Ferrer, 1 Pet. (U. S.) 22 (1828); Hartford F. Ins. Co. v. Bonner Merc. Co., 15 U. S. App. 134, 5 C. C. A. 524, 56 Fed. 378 (1893); Blood v. Shine, 2 Fla. 127 (1848); Liverpool, etc., Ins. Co. v. Goehring, 99 Pa. St. 13 (1881); Tank v. Rohweder, 98 Iowa 154, 67 N. W. 106 (1896); McDonald v. Arnout, 14 Ill. 58 (1852); Golder v. Mueller, 22 Ill. App. 527 (1887).

[152] Barnard v. Lancashire Ins. Co., 101 Fed. 36, 41 C. C. A. 170 (1900).

It is the duty of each party to act in good faith to accomplish the appraisement in the way provided by the policy. If either acts in bad faith, so as to defeat the real object of the clause, it absolves the other from compliance therewith.[153] Where, after the arbitrators disagree,

[153] Uhrig v. Williamsburgh, etc., Ins. Co., 101 N. Y. 362 (1886); Chainless Cycle Mfg. Co. v. Security Ins. Co. (N. Y.), 62 N. E. 392 (1901); Stemmer v. Scottish Ins. Co., 33 Ore. 65, 53 Pac. 498 (1898), contains a full discussion of the matter of misconduct of arbitrators. In the course of the decision the court said: "Plaintiff at the time of Fisher's appointment knew that he resided in California, and if his residence tended to render him ineligible, a failure to except to him must necessarily be deemed a waiver of any objection on that ground. * * * It is maintained that the inadequacy of the award is so gross as to warrant the court in setting it aside. In Bradshaw v. Agricultural Ins. Co., 137 N. Y. 137, 32 N. E. 1055 (1893), the court having found that an award made by appraisers was $989.61 less than the amount of the damage sustained by a fire, and that an appraiser selected by the insurance company, whom it falsely represented to the insured as an impartial person, was not disinterested, set aside the award; but this result must have been reached as a consequence of the prejudice of the appraiser instead of the inadequacy of the award, or perhaps the combined elements of prejudice and inadequacy afforded the reason for the decree rendered. If an award is adequate, the assured could not be injured thereby, and hence it would seem that a court of equity would be powerless to set it aside, however prejudiced the appraisers may have been. In the absence of fraud or misconduct on the part of the appraisers in the discharge of their duties, their determination is final and conclusive, the rule being that an award deliberately and honestly made will not be set aside merely for excess: Nutter v. Taylor, 78 Me. 424, 6 Atl. 835 (1886); Port Huron, etc., R. Co. v. Callanan, 61 Mich. 22, 34 N. W. 678 (1886); Goddard v. King, 40 Minn. 164, 41 N. W. 659 (1889); Ellicott v. Coffin, 106 Mass. 365 (1871); Davis v. Henry, 121 Mass. 150 (1876); Underhill v. Van Cortlandt, 2 Johns. Ch. (N. Y.) 339 (1817). The rule is quite general that the exclusion of pertinent and material testimony by the appraisers is usually fatal to the award: Mosness v. German, etc., Ins. Co., 50 Minn. 341, 52 N. W. 932 (1892); Van Cortlandt v. Underhill, 17 Johns. (N. Y.) 405 (1819); Canfield v. Watertown F. Ins. Co., 55 Wis. 419, 13 N. W. 252 (1862); Citizens' Ins. Co. v. Hamilton, 48 Ill. App. 593 (1892); Hart v. Kennedy, 47 N. J. Eq. 51, 20 Atl. 29 (1890). An exception to this rule seems to be that, if the persons selected as appraisers possess peculiar skill or knowledge concerning the subject-matter, and it appears that the parties to the submission intended to rely on such skill or knowledge, the appraisers will be justified in refusing to hear evidence: Hall v. Norwalk F. Ins. Co., 57 Conn. 105, 17 Atl. 356 (1889); but however this may be, it is admitted that neither of said appraisers possessed any peculiar skill or knowledge."

the one appointed by the insured refuses to act further, the insured should at once appoint another, and if he fails to do so, he is bound by the award of the umpire and the other appraiser.[154] The tribunals provided for by the different forms of policies differ in their organization, and hence permit different methods of procedure.

The New York form provides that two disinterested appraisers be selected by the parties and a competent and disinterested umpire be selected by the appraisers. The umpire takes no part in the matter until the issue with reference to which there is a disagreement is submitted to him by the appraisers. Under the Massachusetts form, the company and the insured each choose one out of three persons to be named by the other, and the third is selected by the two so chosen. The three are known as referees, and act together in the consideration of all matters submitted to them. An umpire may or may not be an arbitrator, depending upon the language of the provision. A technical umpire is one who determines the whole dispute as if he had been originally appointed sole arbitrator. A third arbitrator must act with the others throughout the hearing and simply be one of a majority.

The Minnesota form contemplates and provides for a board of referees, to be made up of disinterested and impartial men, chosen for their ability and fairness. Such a board is a *quasi*-court and is governed by the rules applicable to common law arbitrations.

Where two of the referees proceed to act together privately, collecting information and examining witnesses without regard to the third referee, and finally making up the award without reference to him, and where evidence is received by the full board without affording the parties sworn an opportunity to be present in person or by counsel, such conduct will invalidate the award. While allowed reasonable freedom personally to inspect the ruins of the fire and the debris and remnants, and the damaged goods, for the purpose of applying their knowledge in considering the evidence, the inquiry must be conducted by the board in the usual manner of receiving evidence, and the examination of witnesses must be conducted in the presence of the interested parties and their counsel, subject to the tests of cross-examination.[155]

[154] American, etc., Ins. Co. v. Landau (N. J. Eq.), 49 Atl. 738 (1901).

[155] Christianson v. Norwich F. Ins. Co. (Minn.), 88 N. W. 16 (1901). An appraiser acts in a *quasi*-judicial capacity, and must be free from bias in favor of either party: Hickerson v. German, etc., Ins. Co., 96 Tenn. 193, 32 L. R. A. 172 (1896). As to what is meant by the term "dis-

In a recent case in Maryland the court said:[156] "Independently of the distinct requirement of the policy, the law would require combined action by the appraisers who were selected by the parties. They occupied the position of arbitrators, and with respect to the duties of arbitrators the law is fully settled. 'All must be present throughout each and every meeting, equally whether the meeting be for the hearing of evidence, or arguments of the parties, or for consultation or determination upon the award. The disputants are entitled to the exercise of the judgment and discretion, and to the benefit of the views, arguments, and influence of each one of the persons whom they have chosen to judge between them; and they are entitled to these not only in the award, but at every stage of the arbitration, even where a majority are empowered to decide.' The fact that the umpire was not chosen until after the appraisement had been begun would not have invalidated the award. The substantial requirement was that he should decide the differences of judgment between the appraisers. The time at which he was appointed could not injure any one's rights, provided he was on hand to decide the differences between the other two. Although the direction as to appointment was not strictly followed in this particular, the variation did not interfere with any of the duties which he was appointed to perform, and was not of essential importance."

An umpire who is not an arbitrator may obtain information as to certain matters from the experience of disinterested persons if his report correctly expresses his own judgment. Where the policy provided for an award by appraisers, and the parties subsequently, by a written instrument, provided a method of procedure for the umpire, the court said:[157] "It is obviously competent for the parties to modify or waive any provisions of their written contract by a subsequent mutual agreement not in writing." As said by a learned author, "the cases are numerous to show that an arbitrator may submit a material question affecting the merits of the case to another, and, after hearing his opinion, adopt it as his own upon the credit that he gives to the credit and skill of the person to whom he refers."[158] In a leading case, where it was claimed that an arbitrator had not exercised his own

interested," see Brock v. Dwelling House Ins. Co., 102 Mich. 583, 26 L. R. A. 623 (1894).

[156] Caledonia Ins. Co. v. Traub, 83 Md. 524, 35 Atl. 13 (1896).

[157] Bangor Sav. Bank v. Niagara F. Ins. Co., 85 Me. 68, 20 L. R. A. 650 (1892).

[158] Russell Arbitration & Award (3d ed.) 199.

judgment, it was said: "That alone is not sufficient to prove the award bad, for a man may make use of the judgment of another upon whom he can depend, and the valuation of that person is his own if he chooses to adopt it."[159] But an award is avoided where the arbitrators act not upon their own volition and investigation, but under the direction of one of the parties.[160] A distinction is here made between an umpire and a third arbitrator. The latter must act in consultation with the other arbitrators, while an umpire may act and make up his decision alone.[161]

Where it is provided that, in the event of a disagreement between the appraisers, they shall submit their differences to an umpire chosen by them, there is implied a duty on the part of the umpire to examine and consider the appraisement of each party in arriving at his own decision, and the appraisement will be set aside where he refused to examine the estimate made by an appraiser selected by the insured, and perfunctorily accepted that of the appraiser selected by the insurer.[162]

An appraisement and estimate under the standard form of fire insurance can not be set aside for mere inadequacy.[163]

The fact that an award was not made under oath, as provided in the policy, is not sufficient to justify setting it aside.[164] So, an

[159] Emery v. Wase, 5 Ves. Jr. 846 (1801).

[160] Hartford F. Ins. Co. v. Bonner Merc. Co., 44 Fed. 151, 11 L. R. A. 623 (1890).

[161] Hartford F. Ins. Co. v. Bonner Merc. Co., 44 Fed. 151, 11 L. R. A. 623 (1890), note on Arbitration and Award.

[162] Strome v. London Assur. Corp., 20 App. Div. (N. Y.) 571, 162 N. Y. 627, 57 N. E. 1125 (1897).

[163] Strome v. London Assur. Corp., 162 N. Y. 627, 57 N. E. 1125 (1900). In Underhill v. Van Cortlandt, 2 John. Ch. 339 (1817), Chancellor Kent said: "Admitting that there was no corruption or partiality in the arbitrators, and admitting that there was no misconduct in them during the course of the hearing, nor of fraud in the opposite party, then, I say, the court can not inquire into the charge of an over or undervaluation, or of the reasonableness or unreasonableness of the award, but it is binding and conclusive. * * * It is a popular, cheap, convenient and domestic mode of trial which the courts have always regarded with liberal indulgence. They have never exacted from these unlettered tribunals, this *rusticum forum*, the observance of technical rule and formality. They have only looked to see if the proceedings were honestly and fairly conducted, and if that appear to be the case, they have uniformly and universally refused to interfere with the judgment of arbitrators."

[164] Barnard v. Lancashire Ins. Co., 101 Fed. 36, 41 C. C. A. 170 (1900).

award will not be disturbed because the arbitrators considered a fact which was not a proper element of damage; as, that the knowledge of the public that the goods had been in a fire would affect their value.[165] So, a refusal of the arbitrators to allow the owner to furnish any information, under the mistaken impression that he had waived his right to be present, does not constitute a ground for setting aside the award.[166]

Where each of the two arbitrators and the umpire, pursuant to agreement, wrote on a slip of paper his estimate of the damages, and divided the aggregate of the estimates by three, it was held that the insurer could not complain where the result was the exact estimate made by the umpire, without any knowledge on his part of the opinion of the other two arbitrators.[167]

As already noted, the proper proceeding before a tribunal of arbitration is determined by the character of the tribunal created by the terms of the policy in controversy. It is apparent that a very different procedure may be proper where the controversy is left to an umpire from that which would be legal and regular before a *quasi*-judicial tribunal such as is provided for by the Minnesota form of policy.

§ 323. **Waiver.**—The courts are not loath to find grounds for supporting a waiver of the right to arbitrate on the part of the insurance company. Thus, the right to have the amount of damages determined by arbitration is waived by failing to respond to a letter of the insured demanding an appraisal;[168] or by an unreasonable demand by an appraiser for the company that an umpire be chosen who does not live in the vicinity;[169] or by neglect to demand an arbitration within a reasonable time;[170] or by a refusal to permit an agreement of submission to arbitrators to be changed so as to embrace certain prop-

[165] Ætna F. Ins. Co. v. Davis, 21 Ky. L. 1456, 55 S. W. 705 (1900).

[166] Stemmer v. Scottish, etc., Ins. Co., 33 Ore. 65, 53 Pac. 498 (1898). But see Christianson v. Norwich F. Ins. Co. (Minn.), 88 N. W. 16 (1901).

[167] Ætna F. Ins. Co. v. Davis, 21 Ky. L. 1456, 55 S. W. 705 (1900).

[168] Milwaukee, etc., Ins. Co. v. Schallman, 188 Ill. 213, 59 N. E. 12 (1900).

[169] Hickerson v. German, etc., Ins. Co., 96 Tenn. 193, 33 S. W. 1041, 32 L. R. A. 172 (1896); Brock v. Dwelling House Ins. Co., 102 Mich. 583, 26 L. R. A. 623, 61 N. W. 67 (1894).

[170] Vangindertaelen v. Phenix Ins. Co., 82 Wis. 112, 33 Am. St. 32 (1892); Hayes v. Milford, etc., F. Ins. Co., 170 Mass. 492, 49 N. E. 754 (1898).

erty claimed by the insured to be covered by the policy, although the company denied that such property was within the policy;[171] or where, after a failure of the arbitrators to agree, the company requests the insured to make out proofs of loss in a certain amount, which is complied with;[172] or by a refusal to submit to an appraisal upon an offer by the insured after a previous refusal by the insured to enter into an arbitration;[173] or by accepting proofs of loss;[174] or by a denial of all liability;[175] or by an admission of liability, except for goods which it claims were not covered by the policy.[176] Where the insured made and submitted proofs of loss and notified the company that, unless it adjusted the loss or agreed to an appraisal by a named date, it would be deemed to have waived such appraisal, and the damaged property would be sold, and an agent of the company stated that he did not demand an appraisal by which to settle the controversy, and the plaintiff, relying on such refusal, sold the property and thereafter the company demanded an appraisal, it was held that the matter of waiver should be submitted to the jury.[177]

§ 324. **Second arbitration—Resubmission.**—Where the policy provides that an offer to arbitrate the amount of the damages is a con-

[171] George Dee & Sons Co. v. Key City F. Ins. Co., 104 Iowa 167, 73 N. W. 594 (1897).

[172] Manchester F. Assur. Co. v. Koerner, 13 Ind. App. 372, 40 N. E. 1110, 41 N. E. 848 (1895).

[173] Schrepfer v. Rockford Ins. Co., 77 Minn. 291, 79 N. W. 1005 (1899). In this case it was held that a refusal of the insured to enter into arbitration, which was a condition precedent to any right of action on the policy, was a waiver of her right to an appraisal, but not an extinguishment of her right to recover on the policy, where the insurer had not been deprived of any legal right or suffered any damage by the delay.

[174] Virginia, etc., Ins. Co. v. Cannon, 18 Tex. Civ. App. 588, 45 S. W. 945 (1898); Hartford F. Ins. Co. v. Cannon, 19 Tex. Civ. App. 305; Manchester F. Assur. Co. v. Koerner, 13 Ind. App. 372, 40 N. E. 1110, 41 N. E. 848 (1895); American F. Ins. Co. v. Stuart (Tex.), 38 S. W. 395 (1896).

[175] Hamberg v. St. Paul, etc., Ins. Co., 68 Minn. 335, 71 N. W. 388 (1897); Ætna Ins. Co. v. Simmons, 49 Neb. 811, 69 N. W. 125 (1896); Baldwin v. Fraternal, etc., Ass'n, 46 N. Y. Supp. 1016 (1897); Stephens v. Union Assur. Soc., 16 Utah 22, 50 Pac. 626 (1897). But see Murphy v. Northern British, etc., Co., 61 Mo. App. 323 (1895).

[176] Westfield Cigar Co. v. Insurance Co., 169 Mass. 382, 47 N. E. 1026 (1897).

[177] Chainless Cycle Mfg. Co. v. Security Ins. Co., 64 N. Y. Supp. 1060, 52 App. Div. (N. Y.) 104 (1900), affirmed in Ct. of App., 62 N. E. 392 (1901).

dition precedent to the right to maintain an action on the policy, a failure of the arbitrators selected by the parties to agree on an umpire or to arrive at a conclusion, without the fault of either party, does not justify the insured in refusing to proceed with the arbitration by the selection of a new arbitrator. In such cases the provision for arbitration is still in force, and the necessary steps should be taken to secure a new appraisal.[178] There is some conflict of authority as to the right to resubmission. Courts which construe the provision strictly as an attempt to restrict the general right of a party to resort to the courts, hold that the condition has been complied with when the arbitrators are appointed as provided in the policy. "One of the fundamental and essential constitutional rights of a citizen," says Mr. Justice Caldwell, "is the right to appeal to a court of justice for a redress of his grievances. One of the chief ends of government is to secure this right to the citizen. While some courts hold that a citizen may by contract bargain away this right, the agreement to do so will not be extended by construction or implication."[179]

But "the law undoubtedly is," said Mr. Justice Mitchell,[180] "that, under such a provision, if the award is set aside for misconduct of the arbitrators not participated in or caused by the insured, the agreement for an appraisement still remains in force, and a new appraisement, unless it had become impossible, would still be a condition precedent to a right of action on the policy, unless waived."

But apparently an insurance company must accept the insured's claim that the award is invalid or take the risk of being compelled to sustain the contrary view. It stands by the award at its peril. In the case from which the rule was just quoted, the learned judge said: "Its conduct after plaintiffs rejected the award clearly constituted a waiver of the right to a new appraisement. Not only did it never ask for or even suggest a new appraisement, but in its communications with the plaintiffs it expressly insisted upon the award

[178] Westenhaver v. German, etc., Ins. Co. (Iowa), 84 N. W. 717 (1900).

[179] Western Assur. Co. v. Decker, 98 Fed. 381, 39 C. C. A. 383 (1899).

[180] Levine v. Lancashire Ins. Co., 66 Minn. 138, 68 N. W. 855 (1896) [citing Hiscock v. Harris, 80 N. Y. 402 (1880); Carrol v. Girard F. Ins. Co., 72 Cal. 297, 13 Pac. 863 (1887); Hood v. Hartshorn, 100 Mass. 117 (1868); Thorndike v. Wells Memorial Ass'n, 146 Mass. 619, 16 N. E. 747 (1888); Davenport v. Long Island Ins. Co., 10 Daly (N. Y.) 535 (1882); Uhrig v. Williamsburgh, etc., Ins. Co., 101 N. Y. 362, 4 N. E. 745 (1886)].

already made, and notified them that any claim under the policy must be on that basis and no other. It took the same position in its answer." In a later case,[181] the same court held that when one of the parties to such a controversy refuses to abide by the award on the ground of misconduct of the referees, and notifies the other party of that fact, stating the grounds of the objection and demanding a resubmission, the party so notified has the option to stand by the award or submit to a reappraisement, and if he so elects to abide by the award, and the same is adjudged illegal for the cause assigned, then there can be no resubmission to other referees, but the damages may be determined in an action brought to set aside the award.

The insurance company attempted to avoid a waiver by inserting in its answer a demand for a resubmission of the controversy to arbitrators if, for any reason unknown to it, the award should be held invalid. In reference to the Levine case,[181a] the court said: "In that case the court did not base its decision upon the fact that the defendant company was connected with the fraud of the referees, but held that the insurer was not entitled to a resubmission to another board of arbitration for the reason that the defendant, by its conduct, had waived such right by not suggesting a new appraisement and in expressly insisting upon the award as made and notifying the insured that any claim under the policy must be on the basis of that award and no other. In the answer in that case defendant made no suggestion of reappraisement, but insisted from first to last upon the validity of the award; whereas, in the case before us, appellant, in its answer, after denying the allegations of the complaint as to the invalidity of the award, asserted that it was valid and binding, and alleged that if such award should be declared invalid, then that question should be resubmitted. The demand for resubmission was conditioned on the result of the action and was of no importance. In our opinion, the Levine case lays down a sound principle, and one which is controlling in this case, which is to the effect that where the award is attacked on the ground of fraud and misconduct by a referee, and one party to the controversy notifies the other of that fact, demanding a reappraisement on account of such misconduct, it then becomes the duty of the other party to investigate the validity of the charges and determine whether or not it will abide by it or submit to a reappraisement, and if it shall determine to abide by the award and

[181] Christianson v. Norwich F. Ins. Co. (Minn.), 88 N. W. 16 (1901).

[181a] Levine v. Lancashire Ins. Co., 66 Minn. 138, 68 N. W. 855 (1896).

refuse to submit to a reappraisement, such party is thereby estopped from thereafter demanding another appraisement in case the charges so made shall be sustained."

Not only is a party who is not at fault and who has not waived his right entitled to a resubmission of the amount of his damages to arbitrators, but, after an unsuccessful attempt, arbitration or excuse for not arbitrating is still a condition precedent to the right of the insured to maintain an action on the policy. This is on the theory that until an offer has been made, the plaintiff has not in good faith done all that is reasonably within his power to have the agreement carried into effect, and the damages ascertained in the mode provided for in the contract. Hence, where the determination by arbitration of the amount of the loss is a condition precedent to a right of action, the plaintiff in an action on the policy must prove performance or a valid excuse for non-performance. If the award is invalid it is the duty of the insured to seek a new determination of the amount of the loss in the manner provided by the contract. He must, therefore, allege and prove either that the amount of the plaintiff's loss has been determined by arbitrators chosen in the manner stipulated by the parties or some sufficient reason why such determination has become unnecessary or impossible.[182]

But in a case in the circuit court of appeals the policy provided that in case of loss and disagreement as to the amount thereof, each party should appoint an appraiser, and the two should select an umpire, who should appraise the loss, and that no action should be maintained on the policy until after the insured should have fully complied with such provision. It was held that the insured discharged his obligations when he appointed an appraiser in good faith; and if the appraisement failed without his fault, he was not required to propose the selection of other appraisers, but might resort to the courts to have his damages assessed.[183] So, it was said in Maryland that "if the appraisement fail without the fault of the insured, the failure would not be an impediment to their right to recovery if they could maintain their suit on other grounds."[184] So, in North Carolina it was said: "Where the arbitrators, or a majority of them, fail to agree upon an award, the plaintiff, unless he is shown to have acted in bad faith in selecting his arbitrator, is not

[182] Fischer v. Merchants' Ins. Co. (Me.), 50 Atl. 282 (1901).

[183] Western Assur. Co. v. Decker, 98 Fed. 381, 39 C. C. A. 383 (1899); Caledonia Ins. Co. v. Traub, 83 Md. 524, 35 Atl. 13 (1896).

[184] Caledonia Ins. Co. v. Traub, 83 Md. 524, 35 Atl. 13 (1896).

compelled to submit to another arbitration and another delay, but may forthwith bring his action in the courts."[184a]

But where the arbitration fails through the misconduct of one of the parties, he is not, after the award is set aside, entitled to a resubmission. This is recognized by all the courts.[185]

Where the policy provides that the loss shall be ascertained by arbitration, and that any proceeding relative to such arbitration shall not be deemed a waiver of any condition of the policy, the company, by denying liability after an appraisement of the loss, does not waive its right to insist upon the appraisement as conclusive of the amount of the loss.[186]

§ 325. Demand for arbitration as admission of liability.—An insurance company can not demand an appraisal and arbitration of the amount of the loss, and at the same time deny all liability under its policy. Therefore, as there can be nothing to arbitrate where there is no liability, a demand for an appraisal by the insurer, unless the contract provides to the contrary, is a waiver of all defenses going to the question of liability.[187] But the standard form provides that the company shall not be held to have waived any condition or con-

[184a] Pretzfelder v. Merchants' Ins. Co., 116 N. C. 491, 21 S. E. 302 (1895).

[185] "Any attempt on the part of either party to misuse or pervert the provisions of the standard policy for an appraisal so as unreasonably to delay an adjustment, or to secure an unjust abatement of an honest loss, is a breach of good faith and should be treated as a waiver of the condition and as dispensing with the necessity of an appraisal, or warranting a resort to an action without one, if the party thus prejudiced has used all fair and reasonable means and diligence on his part to secure it. To hold otherwise would be to permit the party in fault to profit by his own wrong:" Chapman v. Rockford Ins. Co., 89 Wis. 572, 28 L. R. A. 405 (1895); Hickerson v. German, etc., Ins. Co., 96 Tenn. 193, 32 L. R. A. 172 (1896); McCullough v. Phœnix Ins. Co., 113 Mo. 606 (1893).

[186] Pretzfelder v. Merchants' Ins. Co., 116 N. C. 491, 21 S. E. 302 (1895); citing Howard Ins. Co. v. Hocking, 115 Pa. St. 415, 8 Atl. 592 (1886).

[187] Hickerson v. German, etc., Ins. Co., 96 Tenn. 193, 32 L. R. A. 172 (1896) [citing Lasher v. Northwestern, etc., Ins. Co., 18 Hun (N. Y.) 98 (1879); Rosenwald v. Phœnix Ins. Co., 50 Hun (N. Y.) 172 (1888); Western, etc., Ins. Co. v. Putnam, 20 Neb. 331 (1886); Bailey v. Ætna Ins. Co., 77 Wis. 336 (1890); German, etc., Ins. Co. v. Etherton, 25 Neb. 505 (1889); Wainer v. Milford, etc., Ins. Co., 153 Mass. 335, 11 L. R. A. 599 (1891), and note; Farnum v. Phœnix Ins. Co., 83 Cal. 246 (1890); Savage v. Phœnix Ins. Co., 12 Mont. 458, 33 Am. St. 591 (1892), and note].

ditions of the policy, or any forfeiture thereof, by any requirement, act or proceeding on its part relating to the appraisal.[187a]

§ **326. Right of mortgagee.**—Where a policy is taken out by a mortgagor and delivered to a mortgagee, with an indorsement to the effect that loss, if any, should be payable to the mortgagee, the mortgagee need not be a party to the arbitration. The contract is between the mortgagor and the insurance company, and, unless it contains provisions to the contrary, is under the control of the mortgagor.[188]

XIX. Right to Repair, Rebuild, or Replace.

It shall be optional, however, with this company to take all, or any part, of the articles at such ascertained or appraised value, and also to repair, rebuild, or replace the property lost or damaged with other of like kind and quality within a reasonable time on giving notice, within thirty days after the receipt of the proof herein required, of its intention so to do; but there can be no abandonment to this company of the property described.[189]

[187a] See § 301, *supra*.

[188] Chandos v. American F. Ins. Co., 84 Wis. 184, 19 L. R. A. 321 (1893). In Hathaway v. Orient Ins. Co., 134 N. Y. 409, 17 L. R. A. 514 (1892), it was held that the rights of a mortgagee could not be defeated by an accord and satisfaction between the insurer and the owner of the premises, who took out the policy in his own name. See generally, as to the question of the effect, upon an assignee of an insurance policy, of acts of forfeiture by the assignor, note to Hall v. Niagara F. Ins. Co., 93 Mich. 184, in 18 L. R. A. 135 (1892). *Contra*, Bergman v. Commercial Assur. Co., 92 Ky. 494, 15 L. R. A. 270 (1892). See Brown v. Hartford Ins. Co., 5 R. I. 394 (1858); Harrington v. Fitchburg, etc., Ins. Co., 124 Mass. 126 (1878).

[189] This provision is found in the standard policies in use in New York, New Jersey, Connecticut, Rhode Island, Michigan, South Dakota, Louisiana, North Dakota, Wisconsin and North Carolina. The Iowa clause is similar to that of New York, except that the company is not authorized to repair, or rebuild in case of the total loss of the building. The following provision is found in the standard policies of the states of Massachusetts, Minnesota and Maine: "In case of loss or damage, the company, within sixty days, * * * shall either pay the amount * * * or replace the property with other of the same kind and goodness, or it may within fifteen days after such statement has been submitted, notify the insured of its intention to rebuild or repair the premises, or any portion thereof separately insured by this policy, and shall thereupon enter upon said premises and proceed to repair or rebuild

§ 327. **An option reserved.**—After the damaged property is appraised as provided by statute, the company reserves the right to take the articles or any part thereof at such appraised value. It also reserves an option to repair, rebuild or replace the property lost or damaged with other of like kind and quality within a reasonable time on giving notice, within thirty days after receipt of proofs, of its intention so to do. The right to rebuild does not exist unless reserved by the terms of the contract.[190] The insurer can elect either of the privileges reserved to it by this provision of the policy, but by the selection of one it abandons the others. Thus, where the policy contained a provision for the submission of certain matters to arbitration, and provided that it "should be optional with the company to repair, rebuild or replace the property with other of like kind and quality within a reasonable time," the company elected to repair the injury and restore the house to its former condition. After some work was done, defendant was informed that the repairs were completed. The insured claimed that the repairs were insufficient, but declined to specify in what particular. The company made several attempts to complete the repairs, which were unsatisfactory to the defendant, who made and served proofs of loss and claimed payment of the money. The defendant then requested that the matter of damages be submitted to arbitration. The court said:[191] "The insurers had the right to determine the manner in which they would perform their contract, and this right did not depend upon the assent of the insured. Neither his assent nor dissent could affect the power of the defendant under the contract. The rights of the parties rested altogether in contract, and the defendant assumed the responsibility of performing it according to its terms, subject to the right of the insured to damages for any breach of performance. * * * One mode looked to the compensation of the insured by the payment of

the same with reasonable expedition. It is moreover understood that there can be no abandonment of the property insured to the company, and that the company shall not, in any case, be liable for more than the sum insured, with interest thereon from the time when the loss shall become payable, as above provided." The New Hampshire provision is similar to the above except that it limits the time within which the company can give notice of its intention to rebuild to *ten days*.

[190] Wynkoop v. Niagara F. Ins. Co., 91 N. Y. 478, Woodruff Ins. Cas. 203 (1883). See Wallace v. Ins. Co., 4 La. 289 (1832).

[191] Wynkoop v. Niagara F. Ins. Co., 91 N. Y. 478 (1883).

damages for his loss, and the other to the restoration of the subject of the insurance to its former condition. It could not have been contemplated by the parties that both methods of performance were to be pursued. The selection by the defendant of one of these alternatives necessarily constituted an abandonment of the other. The election of the privilege of restoration involved the rejection not only of the right to discharge its liability by the payment of damages to the insured, but also of those provisions of the contract having reference to that method of performance. From the time of such election the contract between the parties became an undertaking on the part of the defendant to build or repair the subject insured and to restore it to its former condition, and the measure of damages for a breach of the substituted contract did not necessarily depend upon the amount of damages inflicted upon the house by the peril insured against."

After the company elects to rebuild the contract becomes one for rebuilding, and the obligation which looks to the payment of money becomes obsolete and inapplicable, and the case then becomes what it would have been if the contract had simply obligated the defendant to rebuild in case of loss.[192] The option must be exercised within a reasonable time, and notice must be given within thirty days after the receipt of the proofs. An offer by the company, more than a year after the proofs of loss were furnished, to rebuild, is too late.[193]

Where two separate companies elect to rebuild, and there is a breach of the new contract to rebuild, the owner may recover his full damages against either of them, leaving the one which pays to secure contribution from the other in a separate action.[194] Where separate companies have separate policies on a single building, a general election to repair and rebuild makes the obligation to repair and rebuild joint or several at the option of the insured.[195]

There is some doubt as to whether the insurer is deprived of the right to rebuild reserved in the policy by the fact that there is a statute requiring the use of a valued policy. In Wisconsin the standard form limits the liability of the insured to the "actual cash value of the property at the time any loss or damage occurs," except "as otherwise provided by statute," and provides that such liability "shall in no

[192] Morrell v. Irving F. Ins. Co., 33 N. Y. 429 (1865). See, also, Beals v. Home Ins. Co., 36 N. Y. 522 (1867); Heilmann v. Westchester Ins. Co., 75 N. Y. 7 (1878).

[193] Maryland, etc., Ins. Co. v. Kimmel, 89 Md. 437, 43 Atl. 764 (1899).

[194] Morrell v. Irving F. Ins. Co., 33 N. Y. 429 (1865).

[195] Hartford F. Ins. Co. v. Peebles Hotel Co., 82 Fed. 546, 27 C. C. A. 223 (1897).

event exceed what it would then cost the insurer to repair and replace the same with other of like kind and quality," and that "it shall be optional, however, with the insurer to rebuild or replace the property lost or damaged with other of like kind and quality." When the policy was issued there was in force a statute which declared that the amount of insurance written in the policy on real estate which has been wholly destroyed "shall be taken conclusively to be the true value of the property when insured, and the true measure of damages when destroyed." It was held that these acts should be construed together, and that the provision for a valued policy was not in conflict with the provision giving the insured the right to rebuild although the building was wholly destroyed.[196] But in Ohio the right to rebuild is regarded as inconsistent with the valued policy statute, as it changes the measure of liability from the amount named in the policy to the cost of rebuilding.[196a]

Where there was a controversy between the insured and insurer as to whether the latter had lost its right to elect to rebuild, the former brought an action to recover a money indemnity, and the insurer set up its election and alleged its willingness to rebuild. It was held that the company had not lost its right, and could not thereafter rescind the position assumed in the pleading and deny liability on its contract of insurance because pending the controversy the cost of building had increased.[197] In the same case it appeared that the policy contained provisions relating to both personal property and buildings, and provided that if there was loss or damage the amount of the same should be ascertained or estimated by the parties or by appraisers, and that when so estimated and the proofs of loss made, the same should be payable sixty days after receipt of these proofs, but that it should be "optional, however, with this company to take all or any part of the articles at such ascertained or appraised value, and also to repair, rebuild or replace the property lost or damaged * * * within a reasonable time on the giving of notice within thirty days after the receipt of proofs of loss herein required, of its intention so to do." It was further provided that the company should be held to have waived any provision or condition of the policy by any act or requirement or proceeding relative to appraisement. It was held that the estimate and the appraisal was preliminary to or a

[196] Temple v. Niagara F. Ins. Co., 109 Wis. 372, 85 N. W. 361 (1901).

[196a] Milwaukee, etc., Ins. Co. v. Russell (Ohio), 62 N. E. 338 (1901).

[197] Langan v. Ætna Ins. Co., 99 Fed. 374 (1900).

part of the final proof of loss required, and that participation by the company in the appraisal to ascertain the damage done to the insured building did not constitute an election on its part to pay the damages in money, which precluded it from thereafter exercising its option to rebuild or repair upon the giving of proper notice.[198]

No deduction can be made for difference in value between the old and the new building constructed by the company under the option reserved in this policy. Where the company elected to rebuild, it was claimed that as a new store of similar dimensions and plan as the old, of new materials, would be worth more than the old one, a deduction ought to be made from the estimate of the cost of the new store for the difference in value between the old and the new store, analogous to the deduction of new for the old in the adjustment of losses on marine policies. "Such a rule," said the court,[199] "is not supported by any principle of justice or by the authority of any adjudged cases. It is founded upon an erroneous construction of the contract. It supposes that the insurers are bound to repair the building or to pay the expenses of the repairs. But no such obligation is imposed upon them by the policy. They have the privilege to make requisite repairs, if they see fit, to protect themselves against the recovery of excessive damages, or for any other reason. But if they elect not to make repairs, they are liable only to pay a fair indemnity for the loss. But whatever may be the rule when the building insured is partially injured by the peril insured against, it has no application to cases like the present, where the building is totally destroyed and is to be replaced by a new one. * * * We are therefore of the opinion that there is no rule of damages applicable to the present case; and that in all cases where no rule of damages is established by law, the jury are to decide upon the question, and that to their decision there can be no legal exception."

XX. Time Within Which Loss is Payable.

And the loss shall not become payable until sixty days after the notice, ascertainment, estimate, and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers when appraisal has been required.[200]

[198] Langan v. Ætna Ins. Co., 96 Fed. 705 (1899).

[199] Brinley v. National Ins. Co., 11 Metc. (Mass.) 195 (1846).

[200] This provision is found in the standard policies of New York, New Jersey, Rhode Island, Connecticut, Iowa, South Dakota, North Dakota,

§ 328. **In general.**—The insurance company has sixty days after due proof of loss and award by appraisers, when appraisal has been required, within which to pay the amount found due, and a suit commenced before the expiration of the sixty days is prematurely brought.[201] The Michigan statute provides that suits at law may be maintained against the insurer for claims which may have accrued, if payments are withheld more than sixty days after such claims become due. Where the sum for which the company might be liable was payable sixty days after due notice, it was held that an action commenced on November 24 for a loss by fire, proofs of which were furnished on September 9, was premature, as the action did not lie until the expiration of one hundred and twenty days from the time the proofs of loss were filed.[202]

Where the policy provided that the loss should be paid within sixty days after receiving proofs of loss, and a complaint was filed August 30, which alleged that the plaintiff notified the company of the loss on June 23, and that its adjuster two or three days thereafter made inquiry into the facts and notified the plaintiff that the loss could not be paid, it was held that the action was not prematurely brought.[203]

Where the policy contains no reference to the charter of a mutual company, the rights of the parties are determined by this provision in the policy, and not by some charter provision which provides for a different procedure.[204] An action may be brought without waiting for the expiration of the sixty days after proofs of loss where the company denies all liability, and refuses to ascertain or adjust the loss, and its officer states that the only way a settlement can be obtained is "at the end of a lawsuit."[205]

Michigan, Louisiana and North Carolina. The Wisconsin clause reads, "and the loss shall become payable sixty days after the notice and proof of loss herein required have been received by this company." Massachusetts, Minnesota, Maine and New Hampshire have the following provision: "In case of any loss or damage, the company, within sixty days after the insured shall have submitted a statement, as provided in the preceding clause, shall either pay the amount for which it shall be liable or replace," etc.

[201] Gillon v. Northern Assur. Co., 127 Cal. 480, 59 Pac. 901 (1900).

[202] Putze v. Saginaw, etc., Ins. Co. (Mich.), 86 N. W. 814 (1901).

[203] Home Ins. Co. v. Sylvester, 25 Ind. App. 207, 57 N. E. 991 (1900).

[204] First Baptist Church v. Citizens', etc., Ins. Co., 119 Mich. 203, 77 N. W. 702 (1899).

[205] Hosmer v. St. Joseph, etc., Ins. Co., 80 Mo. App. 419 (1899).

XXI. *Time of Bringing Suit.*

No suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire.[206]

§ 329. **Validity.**—It is generally held that a provision in a policy of insurance limiting the time for an action thereon to a period less than that prescribed by the statute of limitations is valid and enforceable,[207] although in a few instances such provisions have been held void as against public policy.[208]

[206] This provision is found in the standard policies of New York, New Jersey, Rhode Island, Connecticut, Michigan, Louisiana, South Dakota and North Carolina. The clause does not appear in the Wisconsin standard policy, and North Dakota has no time limit other than the statute of limitations within which suit must be brought. The Iowa form is as follows: "No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, including appraisal, and until after an award shall have been obtained fixing the amount of such claim in the manner above provided, when the company has elected to appraise, nor unless commenced not later than one year next after the time when a cause of action accrues." The Massachusetts, Minnesota and Maine policies provide that: "No suit or action against this company for the recovery of any claim by virtue of this policy shall be sustained in any court of law or equity in this state unless commenced within two years from the time the loss occurs." New Hampshire limits the time for bringing the action to one year.

[207] Riddlesbarger v. Hartford Ins. Co., 7 Wall. (U. S.) 386, Woodruff Ins. Cas. 211 (1868); Morrill & Co. v. New England F. Ins. Co., 71 Vt. 281, 44 Atl. 358 (1899); Guthrie v. Connecticut Indem. Ass'n, 101 Tenn. 643, 49 S. W. 829 (1898); Peoria, etc., Ins. Co. v. Whitehill, 25 Ill. 382 (1861); Williams v. Vermont, etc., Ins. Co., 20 Vt. 222 (1848); Wilson v. Ætna Ins. Co., 27 Vt. 99 (1854); North Western Ins. Co. v. Phœnix, etc., Co., 31 Pa. St. 448 (1858); Brown v. Savannah, etc., Ins. Co., 24 Ga. 101 (1858); Portage, etc., Ins. Co. v. West, 6 Ohio St. 599 (1856); Amesbury v. Bowditch, etc., Ins. Co., 6 Gray (Mass.) 596 (1856); Fullam v. New York Ins. Co., 7 Gray (Mass.) 61 (1856); Carter v. Humboldt F. Ins. Co., 12 Iowa 287 (1861); Stout v. City F. Ins. Co., 12 Iowa 371 (1861); Ripley v. Ætna Ins. Co., 29 Barb. (N. Y.) 552 (1859); Gooden v. Amoskeag F. Ins. Co., 20 N. H. 73 (1849); Brown v. Roger Williams Ins. Co., 5 R. I. 394 (1858); Ames v. New York, etc., Ins. Co., 14 N. Y. 253 (1856). *Contra*, Eagle Ins. Co. v. Lafayette Ins. Co., 9 Ind. 443 (1857); French v. Lafayette Ins. Co., 5 McLean (U. S.) 461 (1853); Shawnee F. Ins. Co. v. Bayha, 8 Kan. App. 169, 55 Pac. 474 (1898).

[208] Omaha F. Ins. Co. v. Drennan, 56 Neb. 623, 77 N. W. 67 (1898).

The provision does not apply to an action to enforce a compromise agreement made between the parties after the property is destroyed.[209] The failure of a mortgagee to bring an action within the time limited by the mortgage clause is not a bar to an action brought by the mortgagor within the time.[210]

The statute of limitations in contracts of insurance will not be applied with the same degree of rigidity as ordinary statutes of limitation, and is not applicable where the performance of the conditions precedent is, without fault or laches on the part of the insured, rendered impossible by the acts of the insurer, or by the act of God, or of the government, or of the courts.[211]

The rule of the New York code, that an attempt to commence an action is equivalent to its actual commencement so far as the statute of limitations is concerned, applies to limitations created by contract as well as those imposed by statute. This provision of the standard policy, being specifically prescribed by law, is not properly a contractual limitation. "The law establishes the period of limitation, and forbids the parties from disregarding it. The law as effectually established the period of limitation as if it had declared in express terms that the limitation of time for the commencement of an action upon a fire insurance policy should be the period of one year. Practically, then, this limitation was specially prescribed by law, and hence falls directly within the principle of the [earlier] decisions of this court."[212]

This provision is waived by a representation of an agent that the company will pay without suit.[213] So, where the conduct of the insured is such as to mislead the insured and prevent him from prosecuting his claim within the time limited in the policy, the limitation is waived.[214]

§ 330. **Time when limitation begins to run.**—This form of policy provides that an action must be brought within twelve months next *after a fire*. Formerly it was customary to use the expression, after

[209] Hanover F. Ins. Co. v. Hatton, 21 Ky. L. 1533, 55 S. W. 681 (1900).

[210] Shawnee F. Ins. Co. v. Bayha, 8 Kan. App. 169, 55 Pac. 474 (1898).

[211] Jackson v. Fidelity, etc., Co., 75 Fed. 359, 41 U. S. App. 552 (1896).

[212] Hamilton v. Royal Ins. Co., 156 N. Y. 327, 50 N. E. 863 (1898); Hayden v. Pierce, 144 N. Y. 512, 39 N. E. 638 (1895); Titus v. Poole, 145 N. Y. 414, 40 N. E. 228 (1895).

[213] Scottish Union, etc., Ins. Co. v. Enslie, 78 Miss. 157, 28 So. 822 (1900).

[214] De Farconnet v. Western Ins. Co., 110 Fed. 405 (1901).

a loss occurs. There are two directly opposing lines of authorities upon the question whether, under such a policy, the year of limitation begins to run from the time of the fire, or from the time when the loss is ascertained and established and the right to bring an action exists.[215] As said by the supreme court of Wisconsin,[216] "doubtless the tendency of so many courts to construe 'loss' as meaning the time when the liability was fixed induced many insurance companies to substitute the word 'fire,' as in the policy before us; it would seem as if the phrase, 'twelve months next after the fire,' was susceptible of but one meaning, yet the courts have disagreed upon this question also. Some of the decisions are to the effect that the word 'fire' is to be construed as meaning not the date of the fire, but the time when the liability is fixed and an action accrues to the insured. But the better authorities seem to hold that the limitation begins to run from the day of the fire."[217]

Under the Minnesota form of policy, which provides that no suit shall be sustained unless commenced within two years from the time the loss occurs, it is held that the limitation begins to run from the time of the fire or actual destruction of the property.[218]

[215] That the time begins to run from the date when a right to bring an action exists, see Steen v. Niagara F. Ins. Co., 89 N. Y. 315 (1882); Spare v. Home, etc., Ins. Co., 17 Fed. 568 (1883); Chandler v. St. Paul, etc., Ins. Co., 21 Minn. 85 (1874); Ellis v. Council Bluffs Ins. Co., 64 Iowa 507 (1884); Miller v. Hartford F. Ins. Co., 70 Iowa 704 (1886); German Ins. Co. v. Fairbank, 32 Neb. 750 (1891); Barber v. Fire & M. Ins. Co., 16 W. Va. 658 (1880). To the contrary, see Chambers v. Atlas Ins. Co., 51 Conn. 17 (1883); Johnson v. Humboldt Ins. Co., 91 Ill. 92 (1878); Fullam v. New York, etc., Ins. Co., 7 Gray (Mass.) 61 (1856); Glass v. Walker, 66 Mo. 32 (1877); Bradley v. Phœnix Ins. Co., 28 Mo. App. 7 (1887); Virginia, etc., Ins. Co. v. Wells, 83 Va. 736 (1887); Peoria Sugar Refining Co. v. Canada, etc., Ins. Co., 12 Ont. App. 418 (1885); Blair v. Sovereign F. Ins. Co., 19 N. S. (7 Russell & G.) 372; Travelers' Ins. Co. v. California Ins. Co., 1 N. Dak. 151 (1890); Schroeder v. Keystone Ins. Co., 2 Phila. (Pa.) 286 (1857). See authorities in note to 27 L. R. A. 48.

[216] Hart v. Citizens' Ins. Co., 86 Wis. 77 (1893); Friezen v. Allemania F. Ins. Co., 30 Fed. 352 (1887); Hong Sling v. Insurance Co., 7 Utah 441 (1891); Case v. Sun Ins. Co., 83 Cal. 473 (1890).

[217] Hart v. Citizens' Ins. Co., 86 Wis. 77, 56 N. W. 332, Woodruff Ins. Cas. 213 (1893); Steel v. Phenix Ins. Co., 47 Fed. 863 (1891); State Ins. Co. v. Meesman, 2 Wash. 459 (1891); McElroy v. Continental Ins. Co., 48 Kan. 200 (1892); Travelers' Ins. Co. v. California Ins. Co., 1 N. Dak. 151 (1890); King v. Watertown F. Ins. Co., 47 Hun (N. Y.) 1 (1888).

[218] Rottier v. German Ins. Co. (Minn.), 86 N. W. 888 (1901).

CHAPTER XIII.

CERTAIN GENERAL PROVISIONS OF THE STANDARD POLICY.

XXII. Measure of Damages.

This company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value, with proper deduction for depreciation however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality; said ascertainment or estimate shall be made by the insured and this company, or, if they differ, then by appraisers, as hereinafter provided; and, the amount of loss or damage having been thus determined, the sum for which this company is liable pursuant to this policy shall be payable sixty days after due notice, ascertainment, estimate, and satisfactory proof of the loss have been received by this company, in accordance with the terms of this policy.[1]

[1] This provision is found in the standard policies of New York, New Jersey, Connecticut, Rhode Island, Michigan, South Dakota, Iowa, North Dakota, Louisiana and North Carolina. Wisconsin inserts, "except when otherwise provided by statute," in referring to liability beyond the actual cash value of the property. Massachusetts and Maine

§ 332. **In general.**—This method of providing for the amount of recovery is in some respects in conflict with the valued policy laws in force in many states, and it must be construed in connection with such statutes.

§ 333. **Valued policy legislation.**—Where the policy is valued and there is a total loss, the amount of recovery is determined by the face of the policy.[2] Whether it is a valued one must be determined by the language of the contract and by existing statutes. The policy will be regarded as an open one, unless it appears to be the intention of the parties to the policy, upon a fair and reasonable construction of its terms, to value the loss and thereby fix by contract the amount of the recovery. The question must be determined by the intention of the parties gathered from the whole instrument.[3] But where a statute requires all policies to be valued, the language of the policy becomes immaterial,[4] and the amount written in the policy must be

have the following clause: "This company shall not be liable beyond the actual value of the insured property at the time any loss or damage occurs. In case of any loss or damage the company, within sixty days after the insured shall have submitted a statement, as provided in the preceding clause, shall either pay the amount for which it shall be liable, which amount if not agreed upon shall be ascertained by award of referees as hereinafter provided, or replace the property with other of the same kind and goodness * * * and that the company shall not in any case be liable for more than the sum insured, with interest thereon from the time when the loss shall become payable, as above provided." The Minnesota clause is similar to the above except that the first paragraph, relieving the company from liability beyond the actual value of the insured property at the time any loss or damage happens, is omitted. The New Hampshire clause provides that: "This company shall not be liable beyond the actual value of the insured property at the time any loss or damage happens, except on buildings totally destroyed, in which case the full amount of the limitation shall be paid * * * and that the company shall not in any case be liable for more than the sum insured, with interest thereon from the time when the loss shall become payable as hereinafter provided. * * * In case of any loss or damage the company, within sixty days after the insured shall have submitted a statement, * * * shall either pay the amount for which it shall be liable or replace the property with other of like kind and goodness."

[2] Phœnix Ins. Co. v. McLoon, 100 Mass. 475 (1868).

[3] Insurance Co. v. Butler, 38 Ohio St. 128, Woodruff Ins. Cas. 207 (1882).

[4] Oshkosh Gas-Light Co. v. Germania F. Ins. Co., 71 Wis. 454, Woodruff Ins. Cas. 209 (1888); Milwaukee, etc., Ins. Co. v. Russell (Ohio), 62 N. E. 338 (1901), and cases cited.

taken conclusively to be the true value of the property, and the amount of the recovery where there is a total loss.[5] Thus, a fire insurance company is liable, in case of a total loss, for the full amount of the policy, notwithstanding the provision in the policy by which it agrees to pay only three-fourths of the value in case of loss, where a statute provides that such company shall be liable for the full estimated value of the property insured, as the same is fixed on the face of the policy.[6]

Valued policy laws are now in force in twenty-one states, having been adopted by Wisconsin in 1874, Ohio and Texas in 1879, New Hampshire in 1885, Arkansas, Delaware and Nebraska in 1889, Oklahoma in 1890, Mississippi in 1892, Kansas, Kentucky and Oregon in 1893, Minnesota in 1895, South Carolina in 1896, Florida, Iowa and Washington in 1897, West Virginia in 1899, and California in 1901. These statutes vary in phraseology, but that of Wisconsin, which was the first enacted, may be used as an illustration. It provides that "whenever any policy of insurance shall be written to insure any real property, and if the property insured shall be wholly destroyed without criminal fault on the part of the insured or his assigns, the amount of insurance written in such policy shall be taken conclusively to be the true value of the property when insured, and the true amount of loss and the measure of damages when destroyed."

This provision of the standard policy must be construed in connection with the valued policy law, which, in the event of a total loss, determines conclusively that the amount named in the policy is the "actual cash value of the property."[7]

Overvaluation under a valued policy, unless fraudulent, does not affect the right to recover. The valued policy laws do not as a rule apply to personal property.[8]

[5] Temple v. Niagara F. Ins. Co., 109 Wis. 372, 85 N. W. 361 (1901).

[6] Caledonian Ins. Co. v. Cooke, 101 Ky. 412, 41 S. W. 279 (1897); Phœnix Ins. Co. v. Peak, 20 Ky. L. 1035, 47 S. W. 1089 (1898).

[7] Temple v. Niagara F. Ins. Co., 109 Wis. 372, 85 N. W. 361 (1901); Reilly v. Franklin Ins. Co., 43 Wis. 449 (1877); Thompson v. Insurance Co., 45 Wis. 388 (1878); Seyk v. Millers', etc., Ins. Co., 74 Wis. 67, 3 L. R. A. 523 (1889); Oshkosh Gas-Light Co. v. Germania F. Ins. Co., 71 Wis. 454, 37 N. W. 819 (1888).

[8] Cushman v. Northwestern Ins. Co., 34 Me. 487 (1852); Havens v. Germania F. Ins. Co., 123 Mo. 403, 27 S. W. 718, 26 L. R. A. 107 (1894); German Ins. Co. v. Jansen, 18 Tex. Civ. App. 190, 45 S. W. 220 (1898); Vergeront v. German Ins. Co., 86 Wis. 425 (1893).

§ 334. Constitutionality of valued policy laws.—The insurance companies have strenuously opposed such legislation, and in several states vigorous executive vetoes have been interposed to acts passed by the legislatures. Such questions have now been settled by a decision of the supreme court of the United States. In affirming the constitutionality of such a statute, Mr. Justice McKenna said:[9] "The specific objections which, it is claimed, bring the statute within the prohibition of the constitution in the last analysis may be reduced to the following: That the statute takes away a fundamental right and precludes a judicial inquiry of liability on policies of fire insurance by a conclusive presumption of fact.

"The right claimed is to make contracts of insurance. The essence of these, it is said, is indemnity, and that the statute converts them into wager policies—into contracts (to quote counsel) having for their bases speculation and profit, 'contrary to the course of the common law.' The statement is broad, and counsel, in making it, ignores many things. The statute tends to assure, not to detract from, the indemnity of the contracts, and if elements of chance or speculation intrude it will be on account of carelessness or fraud. It is admitted that the effect of the statute is to make valued policies of those issued; and the conclusive effect which has been ascribed to their valuation has never been condemned as making them wager policies or as introducing elements of speculation into them.

"The statute, then, does not present the alternative of wager policies to indemnity policies. The change is from one kind of indemnity policy to another kind, from open policies to valued policies, both of which are sanctioned by the practice and law of insurance, and this change is the only compulsion of the law. It makes no contract for the parties. In this it permits absolute freedom. It leaves them to fix the valuation of the property upon such prudence and inquiry as they choose. It only ascribes estoppel after this is done—estoppel, it must be observed, to the acts of the parties, and only to their acts in open and honest dealing. Its presumptions can not be urged against fraud, and it permits the subsequent depreciation of the property to be shown.

"We see no risk to insurance companies in this statute. How can it come? Not from fraud and not from change, because, as we have

[9] Orient Ins. Co. v. Daggs, 172 U. S. 557 (1899), affirming 136 Mo. 382 (1896).

seen, the presumptions of the statute do not obtain against fraud or change in the valuation of the property. Risk, then, can only come from the failure to observe care—the care which it might be supposed, without any prompting from the law, underwriters would observe, and which, if observed, would make their policies true contracts of assurance, not seemingly so, but really so; not only when premiums are paying, but when the loss is to be paid. The state surely has the power to determine that this result is desirable, and to accomplish it even by a limitation of the right of contract claimed by the plaintiff in error.

"It would be idle and trite to say that no right is absolute. *Sic utere tuo ut alienum non loedas* is of universal and pervading obligation. It is a condition upon which all property is held. Its application to particular conditions must necessarily be within the reasonable discretion of the legislative power. When such discretion is exercised in a given case by means appropriate, and which are reasonable, not oppressive or discriminatory, it is not subject to constitutional objection."

§ **335. Meaning of total loss.**—Under a valued policy, the amount named therein is recoverable when there is a total loss. A building is totally destroyed within the meaning of such policy when it no longer exists as a building, although some of the material may have value as material. The New York court of appeals recently said:[10] "A total destruction within the meaning of the policy must mean the complete destruction of the insured property by fire so that nothing

[10] Corbett v. Spring Garden Ins. Co., 155 N. Y. 389, 50 N. E. 282 (1898). See, also, Hamburg, etc., Ins. Co. v. Garlington, 66 Tex. 103, 18 S. W. 337 (1886); Oshkosh Packing, etc., Co. v. Mercantile Ins. Co., 31 Fed. 200 (1887). In Pennsylvania F. Ins. Co. v. Drackett, 63 Ohio St. 41, 57 N. E. 962 (1900), the court said: "It seems to be agreed that it is not necessary to constitute a total loss that all the material composing the building should be destroyed. It is sufficient, though some parts of it remain standing, if the building has lost its identity and specific character as a building, the insurance not being upon the material composing the building but upon the building as such. When the loss by fire is such that its character as a building is destroyed, and it remains simply as a mass of ruins, parts of which may remain standing, but of no value in repairing or rebuilding the structure, though something might be realized from the material by removing it, the loss is regarded as total." See, also, Williams v. Hartford Ins. Co., 54 Cal. 442 (1880).

of value remains of it, as distinguished from a partial loss, where the property is damaged but not entirely destroyed. This does not mean that the materials of which the building was composed were all utterly destroyed or obliterated, but that the building, though some part of it may be left standing, has *lost its character as a building,* and instead thereof has become a broken mass, or so far in that condition that it can not properly any longer be designated as a building. When that has occurred, then there is total destruction or loss. A total loss does not mean absolute extinction; it does not mean that all the parts composing the building are absolutely and physically destroyed, but the inquiry always is whether after a fire, the thing insured still exists as a building."

A building is a total loss where the remnant is inconsiderable compared with the part entirely destroyed, and does not constitute a sufficient basis to restore the burnt building.[11] Thus, a building is a total loss where three of the walls are entirely destroyed, and none of the joists, floor and window sills are left, although the other wall was used in erecting a new building after being condemned as unfit for use.[12] The foundation of the building is not within the contemplation of the parties, and hence the question of injury to the foundation should not be considered in reaching a conclusion as to a total loss.[13]

There is a total loss, although the building was not sound when it was insured, where it is so injured by fire as to be rendered insecure and a menace to life, and for that reason is condemned by the proper authorities.[14]

Under the Minnesota standard policy, total loss is to be ascertained as of the date of its occurrence, and is determined by the following tests:

A building is not a total loss unless it has been so far destroyed by the fire that no substantial part of it above the foundation remains in place capable of being safely utilized in restoring the building to the condition in which it was before the fire.

[11] Murphy v. American Ins. Co. (Tex. Civ. App.), 54 S. W. 407 (1899).

[12] American, etc., Ins. Co. v. Murphy (Tex. Civ. App.), 61 S. W. 956 (1901). See, also, German F. Ins. Co. v. Eddy, 36 Neb. 461, 19 L. R. A. 707 (1893); Seyk v. Millers', etc., Ins. Co., 74 Wis. 67, 3 L. R. A. 523, 41 N. W. 443 (1889).

[13] Murphy v. American, etc., Ins. Co. (Tex. Civ. App.), 54 S. W. 407 (1899).

[14] Monteleone v. Royal Ins. Co., 47 La. Ann. 1563, 18 So. 472 (1895).

The words "total loss," when applied to a building, mean totally destroyed as a building—that is, that the walls, although some portion of them remain standing, are unsafe to use for the purpose of rebuilding and would have to be torn down and a new building erected throughout.

There can be no total loss of a building so long as the remnant of the structure left standing above the foundation is reasonably and safely adapted for use (without being taken down) as a basis upon which to restore the building to the condition in which it was immediately before the fire; and whether it is so adapted depends upon the question whether a reasonably prudent owner of a building uninsured, desiring such a structure as the one in question was before the fire, would, in proceeding to restore the building, utilize such standing remnant as such basis. If he would, then the loss is not total.

A cold storage plant was insured under the following description: "Four-story and basement brick building, with composition roof, and a brick engine and boiler house attached, including steam heating and hoisting apparatus, steam, brine, water and gas pipe fixtures, and all other permanent fixtures, occupied for warehouse purposes." The engine house consisted of a small one-story brick structure attached to the main building, and the whole was considered and operated as an entirety. It was held that, conceding the engine house was but slightly damaged by the fire, the question of total loss must be applied to the structure as a whole.[15]

§ 336. **Total loss to frame building within fire limits.**—Where a policy covers a building located within the fire limits of a city, of a class which, under certain conditions, can not be repaired without violating the city ordinances, there is a total loss when the repairing of the building insured and damaged is prevented by reason of such ordinances. But the value of what remains of the building after a fire, over and above the cost of removing it from the premises, should be deducted from the face of the policy. "There is no question in this case," said the court,[16] "but that the insured building was within

[15] Northwestern, etc., L. Ins. Co. v. Rochester, etc., Ins. Co. (Minn.), 88 N. W. 265 (1901).

[16] Larkin v. Glens Falls Ins. Co., 80 Minn. 527, 83 N. W. 409 (1900); Hamburg, etc., Ins. Co. v. Garlington, 66 Tex. 103, 18 S. W. 337 (1886); Brady v. Northwestern Ins. Co., 11 Mich. 425 (1863); Fire Ass'n v. Rosenthal, 108 Pa. St. 474, 1 Atl. 303 (1885); Monteleone v. Royal Ins. Co., 47 La. Ann. 1563, 18 So. 472 (1895).

such fire limits, and no question but that the building inspector refused a permit to repair the same after the fire. Nor is there any question but that, without proper and suitable repairs, the building was rendered practically worthless by the fire. So we are confronted with the question as to the effect of such ordinances and the action of the inspector thereunder, on the contract of insurance. The question is a new one in this state, and an examination of the books discloses very few adjudged cases on the subject in other states. * * * These authorities lay down the rule that such ordinances are a part of the contract of insurance, and that the insurer is bound thereby. This is in line with the general doctrine that, where the parties contract upon a subject which is surrounded by statutory limitations and requirements, they are presumed to have entered into their engagements with reference to such statute, and the same enters into and becomes a part of the contract." After quoting the statement of Mr. Joyce that under such circumstances a recovery may be had for a total loss, the court said: "To this may be added the qualification that, if what remains of the building after the fire be of any value over and above the cost and expense of removing it, such excess value must be deducted from the recovery." The court declined to pass upon the question whether the determination of the building inspector, or of the board of arbitration, on appeal from his decision, that the building had been damaged to the extent of fifty per cent. of its value, and therefore was not subject to repair under the ordinance, was final and conclusive.

§ 337. **Amount of recovery—Illustrations.**—There are numerous cases which construe provisions similar to that of the standard policy. The purpose of the clause providing that "the company shall not be liable beyond the actual cash value of the property at the time the loss or damage occurs" is to prevent a recovery of damages beyond the prescribed limitation. It does not affect the right of the plaintiff to prove and recover damages in an amount less than the actual cash value of the property destroyed or injured. The value at the date of the loss is the limit of recovery, but it is not a constituent element of a cause of action on the policy, and need not be stated in the complaint.[17] Where the policy provided that the company should not

[17] Osborne v. Phenix Ins. Co. (Utah), 64 Pac. 1103 (1901).

be liable beyond the actual cash value of the property at the time of the loss or damage, which should be ascertained according to such actual cash value, with proper deduction for depreciation, however caused, but in no event to exceed what it would cost the insured to repair or replace the same with material of like kind and quality, it was held that the measure of damages was the sum it would cost the insured to repair or replace the building with one of like kind and quality.[18] The insurance company is not bound by the value placed on the property in the application.[19] A company which, upon an application for additional insurance, increases the amount of the risk, can not, after a loss, restrict its liability to three-fifths of the additional insurance because a stipulation in the original policy provides that it shall cover but a three-fifths' interest in the property designated.[20] The amount of the government tax on whisky destroyed by fire in a bonded warehouse can not be deducted from the amount of the loss in an action by the owner, upon a policy of insurance against all direct loss or damage by fire to the whisky.[21] Where a part of the property was removed to other premises and was there destroyed by fire, and the loss amounts to the face of the policy, the company is not entitled to reduce the loss in the proportion that the value of the property remaining bears to that destroyed, but must indemnify the insured for the whole loss.[22]

XXIII. Prorating Loss with Other Insurers.

This company shall not be liable under this policy for a greater proportion of any loss on the described property, or for loss by and expense of removal from premises endangered by fire, than the amount

[18] McCready v. Hartford F. Ins. Co., 70 N. Y. Supp. 778, 61 App. Div. (N. Y.) 583 (1901). In computing the loss sustained by the insured and chargeable to the insurer under a fire policy, the cost of rebuilding up to the amount to be designated in the policy is to be included, though increased beyond the original cost of construction by reason of an act of the assembly regulating the construction of buildings, passed before the fire, but after the policy was issued, where the improved construction of the building caused by the legislation does not increase its market value: Pennsylvania, etc., Co. v. Philadelphia, etc., Co. (Pa. Com. Pl.), 10 Pa. Dist. R. 181 (1900).

[19] Brown v. Quincy, etc., Ins. Co., 105 Mass. 396 (1870).

[20] London Assur. Corp. v. Paterson, 106 Ga. 538, 32 S. E. 650 (1899).

[21] Queen Ins. Co. v. McCoin, 20 Ky. L. 1633, 49 S. W. 800 (1899).

[22] Westchester F. Ins. Co. v. McAdoo (Tenn.), 57 S. W. 409 (1899).

hereby insured shall bear to the whole insurance, whether valid or not, or by solvent or insolvent insurers, covering such property, and the extent of the application of the insurance under this policy or of the contribution to be made by this company in case of loss, may be provided for by agreement or condition written hereon or attached or appended hereto.[23]

§ 338. **The pro rata clause.**—In the absence of a clause of this character, the insured may recover either a proportionate part of the loss from each insurer or the entire amount from one insurer.[24] An insurer who pays the entire amount is entitled to contribution from the other insurers. As said by Lord Mansfield in an early case:[25] "As between the insurer and the insured, upon the foot of commutative justice merely, there is no colour why the insurers should not pay the insured the whole. For they have received a premium for the whole risque. * * * If the insured is to receive but one satisfaction, natural justice says that the several insurers should all of them contribute *pro rata* to satisfy that loss against which they have all insured, * * * and if the whole should be recovered from one, he ought to stand in the place of the insured to receive contribution from the other, who was equally liable to pay the whole."

This provision of the standard policy is new in form and arrangement. It relates to double or other insurance, and not to insurance upon different interests.[26] The object of the clause is to prevent a multiplicity of actions. Under it there is no right of contribution between companies, as the insured can recover from each only its

[23] This provision is found in the standard policies of New York, New Jersey, Connecticut, Rhode Island, Louisiana, Wisconsin, North Dakota, South Dakota, Michigan and North Carolina. Massachusetts, Maine and New Hampshire have the following clause: "If there shall be any other insurance on the property insured, whether prior or subsequent, the insured shall recover on this policy no greater proportion of the loss sustained than the sum hereby insured bears to the whole amount insured thereon." The Minnesota clause is similar, but provides that it shall not apply in case of total loss on buildings.

[24] See Norwich, etc., Ins. Co. v. Wellhouse (Ga.), 39 S. E. 397 (1901).

[25] Godin v. London Assur. Co., 1 Burr. 489 (1758).

[26] See § 245, *supra;* Fire Ins. Ass'n v. Merchants', etc., Transp. Co., 66 Md. 339 (1886), 7 Atl. 905; McMaster v. Insurance Co., 55 N. Y. 222, 14 Am. Rep. 239 (1873). See note to 15 L. R. A. 127, for cases as to what constitutes double insurance for the purpose of the apportionment of the loss.

full *pro rata* share. Where there are several policies which cover in part the same and in part different property, and contain different and inconsistent provisions, it is practically impossible to prorate the loss by this or by any other rule. Mr. Richards, after referring to the fact that these matters are generally settled by the companies out of court, says that the courts have endeavored to apply the following principles:

1. The different policies are placed as far as possible upon an equality, and special conditions and limitations in one policy are not brought over into another policy.

2. The object of the contribution clause is construed to be a restriction of the amount recovered from each insurer to its equitable contributory share, and must not be permitted to operate so as to reduce the aggregate amount of indemnity which the insured might otherwise recover. No arrangement of the clauses in the policy should be used to the disadvantage of the insured. He must be paid, and the dispute, if any, settled among the underwriters.[27]

Liability is reduced *pro rata* by insurance, whether valid or not, "or by solvent or insolvent insurers."[28]

The provision with reference to valid or invalid insurance refers only to other insurance obtained with the consent of the company, and has no application to other policies.[29] Where there is double insurance, and the total loss exceeds the total insurance, there can be no apportionment, and each insurer must pay in full the amount for which he is individually liable.[30]

XXIV. Subrogation.

If this company shall claim that the fire was caused by the act or neglect of any person or corporation, private or municipal, this company shall, on payment of the loss, be subrogated to the extent of such payment to all the right of recovery by the insured for the loss resulting therefrom, and such right shall be assigned to this company by the insured on receiving such payment.[31]

[27] Richards Ins., § 164, citing Lucas v. Jefferson Ins. Co., 6 Cowen (N. Y.) 635, Woodruff Ins. Cas. 198 (1827). This case contains a general discussion of the rules which govern prorating and contribution.

[28] Cassity v. New Orleans Ins. Ass'n, 65 Miss. 49 (1887).

[29] London, etc., Ins. Co. v. Turnbull, 86 Ky. 230, 5 S. W. 542 (1887).

[30] Lebanon, etc., Ins. Co. v. Kepler, 106 Pa. St. 28 (1884).

[31] This provision is found in the standard policies of New York, New Jersey, Rhode Island, Connecticut, Michigan, Louisiana, Wisconsin,

§ 339. **The general principle.**—The common-law right of subrogation has been referred to elsewhere. The insurer is treated as a surety, and is entitled to all the remedies of the insured against a person who by his wrongdoing causes the destruction of the insured property. "It is well settled that, if a loss under a policy of insurance is occasioned by the wrongful act of a third party, the insurer occupies the position of a mere surety, and the wrongdoer that of a principal debtor; and all the incidents of suretyship attach to the position of the underwriter in such cases, including the right of subrogation. * * * The same principle is applicable to the contract of insurance if the surety [assured] destroys the remedy of subrogation, and relieves the assurer to the full extent to which the wrongdoer could have been made liable for the loss."[32]

The right of subrogation is expressly declared by the standard policy, which also provides for a formal assignment to the company of the insured's right of action against the wrongdoer.

If the insured destroys the insurer's right of subrogation to a claim against the person causing the loss, he can not recover against the insurance company. Thus, where the insured consented to exclude a claim for certain fixtures covered by the policy from the consideration of the jury, in an action against the wrongdoer to recover damages to other larger interests than the fixtures, it was held that he thereby lost his right of action against the insurer on account of the fixtures under a policy which provided that upon payment of the loss the assured should assign his claim against the wrongdoer to the insurer, or prosecute it at the request and expense, and for the

South Dakota, North Dakota, Iowa and North Carolina. The standard policies of Massachusetts, Minnesota, Maine and New Hampshire contain the following clause: "And whenever the company shall pay any loss the assured shall assign to it, to the extent of the amount so paid all rights to recover satisfaction for the loss or damage from any person, town, or other corporation, excepting other insurers; or the insured, if requested, shall prosecute therefor at the charge and for the account of the company."

[32] Dilling v. Draemel, 9 N. Y. Supp. 497 (1890); quoted in Packham v. German F. Ins. Co., 91 Md. 515, 50 L. R. A. 828 (1900). See, also, Chicago, etc., R. Co. v. Glenny, 175 Ill. 238, 51 N. E. 896 (1898); Phœnix Ins. Co. v. Erie, etc., Transp. Co., 117 U. S. 312 (1886), 118 U. S. 210 (1886). In Leavitt v. Canadian, etc., R. Co., 90 Me. 153, 37 Atl. 886, 38 L. R. A. 152 (1897), it was held that the right of recovery against a person causing a loss, which is thus reserved, depends upon the law existing at the time of the fire.

benefit of such insurer. In this case the court said:[33] "It remains for us to determine whether the proceedings resulting in the judgment against the gas company released the wrongdoer and destroyed the defendant's right of subrogation. Now, there was in this case but one tortious and negligent act of the gas company, resulting in one fire, which occurred at one and the same time, as well the loss incurred under this policy as the loss incurred under the other policies for which recovery was had against the gas company. This is admitted by the demurrer, as well as the further facts that that suit was for the whole loss occasioned by the fire; that there was no reservation of any right by the plaintiff for the protection of this defendant, and no agreement qualifying the effect of the verdict; and that by the direction of the plaintiff the recovery did not include any compensation for loss incurred under this policy; and the defendant has no interest in the recovery as to the policy with which we are now concerned. For a single indivisible tort but one suit can be brought. The plaintiff in this case could not now bring another suit against the gas company for his own benefit to recover the loss incurred under this policy, nor could such suit be brought in his name for the benefit of the defendant. * * * The plaintiff had one indivisible cause of action against the gas company, and that cause of action has been merged in the judgment he obtained. When he excluded from that judgment so much of that cause of action as relates to this policy, he as effectually released so much of his right of action as if he had executed and delivered a release under a seal therefor, and as clearly and unequivocally destroyed the defendant's right of subrogation as he would have destroyed it by such release. Any act which makes performance of the agreement to assign either impossible or useless must relieve the insurance company from its concurrent obligation to pay. The plaintiff, in the present case, in order to protect his larger interests under the other policies, and his interest in recovery for loss of profits which were uninsured, has seen fit, for reasons doubtless satisfactory to him, to sacrifice his own and the defendant's interest under the policy in question, and can not now be heard to complain of the result of his own course of conduct."

In a subsequent case in the same state it was held that the settlement of a suit for unliquidated damages, brought by the insured against the wrongdoer, when made with the approval of the major-

[33] Packham v. German, etc., Ins. Co., 91 Md. 515, 50 L. R. A. 828 (1900).

ity of the insurance companies interested in the matter, can not be complained of by the other companies that refused to come into the suit. The court said:[34] "It may be conceded that the insured can not fritter away the rights of the insurer entitled to be subrogated, and that he can not ordinarily make a compromise without being responsible to the insurer for the amount paid by him; but under such circumstances as we have stated there can, in our opinion, be no question about his right to thus settle a suit for unliquidated damages, when the majority of those interested not only approved, but urged it. * * * Where a compromise is made, the insured may retain out of the fund his costs and reasonable expenses incurred in the litigation, and this may include a contingent fee to attorneys." The company is entitled to the benefit of the money received from the wrongdoer for damage done to the insured property only. Hence, where one who had suffered loss by fire recovered from the wrongdoer the sum of $9,000 for the loss of goods, and a certain other sum for the interruption of his business, the insurance companies, which had previously settled with the insured for a sum equal to the entire amount recovered for both items, could hold the insured only for *pro rata* shares of the $9,000.

But the fact that the insurance company has paid the amount of the policy to the insured is no defense to an action by the insured against the wrongdoer for damages.[35] It results from the principle of indemnity that the insured can not recover compensation for his loss from both the insurance company and the wrongdoer; hence, where the property is destroyed by fire negligently set by a railroad company, and the owner settles with the company, and afterwards, without informing the insurer of such fact, receives from it payment for the loss, the insurance company may recover back the money so paid.[36]

A common carrier may, by agreement with the owner of the prop-

[34] Svea Assur. Co. v. Packham (Md.), 48 Atl. 359, 52 L. R. A. 95 (1901).

[35] Anderson v. Miller, 96 Tenn. 35, 31 L. R. A. 604 (1896). In Lake Erie, etc., R. Co. v. Falk, 62 Ohio St. 297, 56 N. E. 1020 (1900), it was held that the insurance company should intervene in an action brought by the owner against the railroad company to recover damages for the destruction of the insured property by fire, and that in the action the amount recovered should be adjudged to the owner and the insurer according to their respective interests.

[36] Chickasaw, etc., Ins. Co. v. Weller, 98 Iowa 731, 68 N. W. 443 (1896).

erty, secure to himself the benefit of the insurance procured by such owner. Thus, where the bill of lading provides that the carrier, when liable for a loss, shall have the full benefit of any insurance upon the goods, the payment of the loss by the company extinguishes the shipper's right of action against the carrier and destroys the insurance company's right to subrogation.[37]

XXV. *Reinsurance.*

Liability for reinsurance shall be as specifically agreed upon.[38]

§ **340. The reinsurance contract.**—The liability on a contract of reinsurance is to be provided for by special agreement. Unless an obligation in favor of the original insured is specifically created by the contract of reinsurance, he is generally regarded as a stranger to such a contract, and has, therefore, no claim on the reinsurer. This is the rule declared by the older authorities, and is based strictly on the principle of indemnity.[39] But some recent cases regard the contract as made for the benefit of the original insured. In New Hampshire it is held that when the original insurer is insolvent the reinsurer must pay the amount for which it is liable directly to the party ultimately entitled to the money. In an action brought by the receiver of an insolvent company against the reinsurer, the court said:[40] "The defendants received the full consideration for the risk against which they insured, and there is no reason why they should not be required to pay the full amount of the loss. The premiums received by them and the sum to be paid by them in case of loss were intended to be, and in theory of law are, precisely equivalent." So, in a recent case in North Carolina, it was held that the insured had an interest in the contract of reinsurance and could sue the reinsurer, notwithstanding the fact that he was not a party to the contract of reinsurance, which expressly provided that no such

[37] Phœnix Ins. Co. v. Erie, etc., Transp. Co., 117 U. S. 312 (1886); Roos v. Philadelphia, etc., Ins. Co., 13 Pa. Super. Ct. 563 (1899); Mercantile F. Ins. Co. v. Calebs, 20 N. Y. 173 (1859).

[38] This provision is found in the standard policies of New York, New Jersey, Rhode Island, Connecticut, Michigan, Wisconsin, Louisiana, Iowa, South Dakota, North Dakota and North Carolina. No such provision is found in the standard policies of Massachusetts, Minnesota, Maine and New Hampshire.

[39] See § 9, *supra*.

[40] Hunt v. New Hampshire, etc., Ass'n, 68 N. H. 305, 38 Atl. 145, 38 L. R. A. 514 (1895).

action could be maintained. The court said:[41] "There is some diversity of opinion in the decisions of the courts in our sister states and the general authorities. There is no question raised as to the validity of the insuring and the reinsuring contracts, each being in due form, and supported by a valuable consideration. A policy of fire insurance is a contract of indemnity; and such contract gives the insurer an insurable interest in the property insured, coextensive with its liability. A contract of reinsurance seems to be a union and blending of the business of the two companies, presumably for the advantage of each party. The reinsurer absorbed the estate and rights of the reinsured, and assumed the risks and liabilities of the reinsured, with the privilege of the reinsured, in the present case, to continue issuing new policies for a time specified, with the same rights and liabilities under the new policies as under those already outstanding; this to be done for the benefit of and under the direction of the defendant. The plaintiffs were neither a party to nor in privity with said contracts. The question is, Have they an interest in, or arising out of, the contract? The defendant is bound to indemnify the reinsured for all risks and loss, and the reinsured, at the same time, is bound to indemnify the plaintiffs for risk and loss. * * * We can see no reason why plaintiffs may not do directly that which it must be admitted they can do indirectly, nor do we see how the defendant is prejudiced thereby. The defendant suggests no such danger, but relies solely on the ground that it has no contract with the plaintiffs.[42] * * * It is the implied right, arising out of the express agreement of the defendant, that enables the plaintiffs to maintain the action."

But the better opinion is that the simple contract of reinsurance is a contract of indemnity, under which the insurer is liable solely to the reinsured company, and not to the policy-holders.[43] Of course, where such contract also includes a promise or agreement to assume and pay losses to the original insured, a policy-holder may proceed directly against the reinsurer upon such promise or undertaking.[44]

[41] Shoaf v. Palatine Ins. Co., 127 N. C. 308, 37 S. E. 451 (1900).

[42] Citing Johannes v. Phenix Ins. Co., 66 Wis. 50, 27 N. W. 414 (1886), which the court says is decisive of this question.

[43] Barnes v. Hekla F. Ins. Co., 56 Minn. 38, 45 Am. St. 438 (1893); Strong v. Phœnix Ins. Co., 62 Mo. 289, 21 Am. Rep. 417 (1876); Carrington v. Commercial, etc., Ins. Co., 1 Bosw. (N. Y.) 152 (1857).

[44] Barnes v. Hekla F. Ins. Co., 56 Minn. 38, 45 Am. St. 438 (1893);

XXVI. Conditions Affecting Mortgagees.

If, with the consent of this company, an interest under this policy shall exist in favor of a mortgagee or of any person or corporation having an interest in the subject of insurance other than the interest of the insured as described herein, the conditions hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance relating to such interest as shall be written upon, attached, or appended hereto.[45]

§ **341. Special provisions.**—The relations between the insurer and a mortgagee, to whom the policy is made payable as his interest may appear, are to be determined by such special provisions as are attached to the policy. In the absence of such provisions a mortgagee to whom a policy is made payable stands in the position of the mortgagor, as far as the insurance company is concerned, and, being bound by his acts, can recover only when there has been no forfeiture by such mortgagor.[46]

A mortgagee, in the absence of any provision making the policy payable to him, has no interest in a policy held by the mortgagor.[47]

Glen v. Hope, etc., Ins. Co., 56 N. Y. 379 (1874); Cahen v. Continental L. Ins. Co., 69 N. Y. 300 (1877).

[45] This clause is found in the standard policies in use in New York, New Jersey, Rhode Island, Connecticut, Michigan, Louisiana, Wisconsin, Iowa, North Dakota, South Dakota and North Carolina. Massachusetts, Minnesota, Maine and New Hampshire have a clause in their standard policies with reference to mortgagees as follows: "If this policy shall be made payable to a mortgagee of the insured real estate no act or default of any person other than such mortgagee or his agents, or those claiming under him, shall affect such mortgagee's right to recover in case of loss on such real estate; provided, that the mortgagee shall, on demand, pay according to the established scale of rates for any increase of risks not paid for by the insured; and whenever this company shall be liable to a mortgagee for any sum for loss under this policy, for which no liability exists as to the mortgagor, or owner, and this company shall elect by itself, or with others, to pay the mortgagee the full amount secured by such mortgage, then the mortgagee shall assign and transfer to the companies interested, upon such payment, the said mortgage, together with the note and the debt thereby secured."

[46] Security Co. v. Panhandle Nat'l Bank, 93 Tex. 575, 57 S. W. 22 (1900); Bates v. Equitable Ins. Co., 10 Wall. (U. S.) 33 (1869); Harrington v. Fitchburg, etc., Ins. Co., 124 Mass. 126 (1878).

[47] Lindley v. Orr, 83 Ill. App. 70 (1898).

A common form of mortgage clause provides that "Loss or damage, if any, under this policy shall be payable to ———, as mortgagee, as his interest may appear, and this insurance as to the interest of the mortgagee therein shall not be invalidated by any act or neglect of the mortgagor or owner of the within described property, nor by any foreclosure or other proceedings or notice of sale relating to the property, nor by any change in the title or ownership of the property, nor by the occupation of the premises for purposes more hazardous than are permitted by this policy, provided that in case the mortgagor or owner shall neglect to pay any premium due under this policy the mortgagee shall, on demand, pay the same." It is also generally provided that the mortgagee shall notify the company of any change of ownership or increase of risk which shall come to his knowledge. A rider of this character is an independent contract between the company and the mortgagee.[48]

It has been held that the provision requiring the mortgagee to notify the insured of any change in ownership coming to his knowledge is directory merely, and that a change to the mortgagee's knowledge which did not increase the risk did not invalidate the policy, although the company was not notified.[49]

A mortgagee to whom a policy is payable in case of loss, as his interest may appear, may, when the mortgagor has forfeited his right to recover, collect only the amount due on the mortgage when the contract was made. Such a provision contemplates a possible diminution of the interest of the mortgagee by part payment of his debt, but does not include additional claims. In reference to the history of this provision, the supreme court of Massachusetts said,[50] "that at first the policy was usually issued to the mortgagor in the common form, and was then assigned to the mortgagee, to the extent of his interest, the insurance company assenting to the assignment; that afterwards, the provisions for the benefit of the mortgagee were inserted in the body of the policy, but that such policies, unless there were stipulations to the contrary, were avoided, as against the mortgagee, by any act of the mortgagor which avoided the policy as to him; and that the present form was adopted in order to give the mortgagee a better se-

[48] Dwelling-House Ins. Co. v. Kansas Loan, etc., Co., 5 Kan. App. 137, 48 Pac. 891 (1897).

[49] Whitney v. American Ins. Co. (Cal.), 56 Pac. 50 (1899).

[50] Attleborough Sav. Bank v. Security Ins. Co., 168 Mass. 147, 46 N. E. 390 (1897); Palmer Sav. Bank v. Insurance Co., 166 Mass. 189, 44 N. E. 211 (1896); Foster v. Van Reed, 70 N. Y. 19, 26 Am. Rep. 544 (1877).

curity, but that the effect was the same as if the mortgagor had taken out the insurance in his own name and then assigned it to the mortgagee to the extent of his interest, and the insurance company had assented to the assignment, and had promised the mortgagee that no act of the mortgagor should defeat the right of the mortgagee to recover to the extent of his interest. But whether the clause is to be considered as an assignment by the mortgagor of an insurance upon his interest, or as a contract made with the insured by which in a certain contingency it promises to pay to the mortgagee an amount to be determined, it seems to us clear that the nature of the interest and the extent of the risk must be made known at the time when the contract is made, in order that the premium may be measured thereby. While the insurance company can not be compelled to pay more than the face of the policy, yet, to obtain the advantages of the subrogation if the plaintiff's contention is correct, it may be compelled to pay several times that amount. The clause in regard to subrogation is inserted as of value to the company and must be taken into consideration in measuring the risk assumed and the consideration paid therefor; but if this amount can not be determined when the contract is made, and may be so great as to make the subrogation clause worthless, it ceases to be one of the elements of the contract."

An action on a policy payable to a mortgagee, as his interest may appear, may be begun before the debt secured by the mortgage is due and payable.[51] The insurance company must pay the loss to the creditor, and can not require him to first proceed against his debtor.[52] The fact that the mortgagee holds collateral security which is ample to pay his debt is no defense in an action by the mortgagee against the insurance company.[53] But the contract generally provides that upon payment of the insurance to the mortgagee, the insurer shall be subrogated to the rights of the mortgagee in such collaterals.[54] Where insurance is procured by a mortgagee on his own interest, the mortgagor has no interest in the proceeds, and can not compel its application to the reduction of his debt.[55]

Where the policy is payable to a mortgagee, as his interest may

[51] Planters', etc., Ins. Co. v. Savings, etc., Co., 68 Ark. 8, 56 S. W. 443 (1900).

[52] Excelsior F. Ins. Co. v. Royal Ins. Co., 55 N. Y. 343, 14 Am. Rep. 271 (1873).

[53] Kernochan v. New York, etc., Ins. Co., 17 N. Y. 428 (1858).

[54] Alamo F. Ins. Co. v. Davis (Tex.), 60 S. W. 802 (1901).

[55] Foster v. Van Reed, 70 N. Y. 19, 26 Am. Rep. 544 (1877).

appear, the balance, if any, to the mortgagor, and the indebtedness equals the total amount of the loss, the action must be brought by the mortgagee. After loss the obligation of the insurance company is a contract for the payment of money, and suit must be brought in the name of the beneficial owner.[56]

XXVII. Construction of Terms—Mutual Companies.

Wherever in this policy the word "insured" occurs, it shall be held to include the legal representative of the insured, and wherever the word "loss" occurs, it shall be deemed the equivalent of "loss or damage."[57]

If this policy be made by a mutual or other company having special regulations lawfully applicable to its organization, membership, policies or contracts of insurance, such regulations shall apply to and form a part of this policy as the same may be written or printed upon, attached, or appended hereto.[58]

§ **342. In general.**—The provisions with reference to the construction of terms, and the application of the standard form of policy to mutual insurance companies, are clear, and require no comment. The general rules of construction have been considered elsewhere.

XXVIII. Indorsement of Other Conditions.

This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements, or conditions as may be indorsed hereon or added hereto.[59]

[56] Capital City Ins. Co. v. Jones (Ala.), 30 So. 674 (1901).

[57] This provision is found in the standard policies in use in New York, New Jersey, Connecticut, Michigan, Rhode Island, Wisconsin, Iowa, South Dakota, Louisiana, North Dakota and North Carolina. It is not contained in the standard policies of Massachusetts, Minnesota, Maine and New Hampshire.

[58] This provision appears in the standard policies of New York, New Jersey, Connecticut, Michigan, Louisiana, Wisconsin, Iowa, North Dakota, South Dakota, North Carolina and Rhode Island. It is not contained in the standard policies of Massachusetts, Minnesota and Maine. New Hampshire provides in the cancellation clause that "mutual companies may vary this clause to suit their methods of business."

[59] This provision is found in the standard policies of New York, New Jersey, Rhode Island, Connecticut, Louisiana, Iowa, Michigan, Wisconsin, South Dakota, North Dakota, and North Carolina. The standard policies of Massachusetts, Minnesota, Maine and New Hampshire do not contain such a provision.

Part VII.

LIFE, ACCIDENT AND INDEMNITY INSURANCE.

CHAPTER XIV.

STIPULATIONS OF LIFE INSURANCE POLICY.

§ 350. **General statement.**—There is no standard form of life insurance policy. Each company uses the form which seems best

adapted to its own manner of doing business; but, as in fire insurance, the tendency is strongly toward the adoption of a simple form, with liberal provisions and stipulations for the benefit of the insured. The form here adopted is now in use by one of the largest life insurance companies in the country, and is noticeable for its simplicity and clearness.

I. *Formal Part of Contract.*

In consideration of the statements and agreements in the application for this policy, which are hereby made a part of this contract, and of the sum of ——— dollars, the receipt of which is hereby acknowledged, and the payment of a like sum on the ——— day of ——— in every year until ——— full years' premiums shall have been paid, or until the death of the insured, should that event sooner occur, DOES INSURE the life of ——— ———, of ——— (herein called the insured), in the amount of ——— dollars for the term of life, payable at its office in the city of ———, to ———, executors, administrators or assigns, upon due and satisfactory proof of interest and of the death of said insured, deducting therefrom all indebtedness to the company on this policy, together with the balance, if any, of the current year's premium.

§ **351. Parties.**—There are commonly but two parties to a fire insurance contract, although there may be a third party to whom the fund or a part thereof has been assigned. In life insurance contracts, however, there are often four parties who must be considered,—the insured, the insurer, the beneficiary, and the holder of the policy. The rules governing the rights and capacities of parties have been already considered.[1]

§ 352. The beneficiary—Manner of designation—Right to fund.—The rights of beneficiaries are closely connected with the right of the insured to assign the policy. A beneficiary is a person to whom the insured directs the payment of the fund upon his death.[2] This

[1] As to the right of an infant to make a contract of insurance, see note to Craig v. Van Bebber, 18 Am. St. 569 (1890), and cases cited at § 11, *supra;* Union, etc., Ins. Co. v. Hilliard, 63 Ohio St. 478, 59 N. E. 230, 81 Am. St. 644 (1900).

[2] As to who may be a beneficiary, see Langdon v. Union, etc., Ins. Co., 14 Fed. 272, Woodruff Ins. Cas. 359 (1882).

fund belongs to the person so designated as beneficiary in the policy, although a different person is named in the application.[3] The language used in designating the beneficiary will, if possible, be so construed as to carry out the intention of the parties.[4] When it is payable to the "children" of the insured it includes his children by a former wife,[5] but not a child of his wife by a former husband.[6] Under a policy payable to the wife of the insured, and, upon her death before the insured, to "their children," a child by a woman to whom the insured is married after the death of his first wife is not a beneficiary.[7]

"Children" includes an adopted child,[8] but not a grandchild.[9] Where the by-laws of the company require that the insured shall designate as beneficiary some one who is "dependent" upon him, the term is strictly construed and confined to those who are actually dependent upon him for support.[10] It includes a wife,[11] but not a concubine[12] or creditor.[13]

[3] Hunter v. Scott, 108 N. C. 213 (1891). A promise by a wife to her husband that she will pay his debts does not create a lien upon the proceeds of a benefit certificate on his life, of which she is the beneficiary: Fisher v. Donovan, 57 Neb. 361, 44 L. R. A. 383, 77 N. W. 778 (1899). The payment of premiums by a person other than the insured does not, in the absence of an agreement to that effect, create a lien on the proceeds: Lennon v. Metropolitan L. Ins. Co., 45 N. Y. Supp. 1033, 20 Misc. (N. Y.) 403 (1897).

[4] Thus, the word "and" in a clause making the policy payable to "A, trustee and the children of B," the latter being the insured, will be read "for" in order to carry out the apparent intention of the insured to make his children the beneficiaries: Atkins v. Atkins, 70 Vt. 565, 41 Atl. 503 (1898).

[5] McDermott v. Centennial, etc., Ass'n, 24 Mo. App. 73 (1887); Evans v. Opperman, 76 Tex. 293 (1890).

[6] Koehler v. Centennial, etc., Ins. Co., 66 Iowa 325 (1885).

[7] Ætna, etc., Ins. Co. v. Clough, 68 N. H. 298, 44 Atl. 520 (1895).

[8] Martin v. Ætna, etc., Ins. Co., 73 Me. 25 (1881).

[9] Cutchin v. Johnston, 120 N. C. 51, 26 S. E. 698 (1897); United States Trust Co. v. Mutual, etc., Ins. Co., 115 N. Y. 152 (1889); Winsor v. Odd Fellows', etc., Ass'n, 13 R. I. 149 (1880). *Contra*, Estate of Conrad, 89 Iowa 396 (1893); Duvall v. Goodson, 79 Ky. 224 (1880).

[10] Ballou v. Gile, 50 Wis. 614 (1880); McCarthy v. Supreme Lodge, 153 Mass. 314 (1891). It does not include a member's fiancee unless dependent as a matter of fact: Alexander v. Parker, 144 Ill. 355 (1893).

[11] Ballou v. Gile, 50 Wis. 614, Woodruff Ins. Cas. 371 (1880).

[12] Keener v. Grand Lodge, 38 Mo. App. 543 (1889).

[13] Skillings v. Massachusetts Ben. Ass'n, 146 Mass. 217 (1888). See Lavigne v. Ligue des Patriotes, 178 Mass. 25, 54 L. R. A. 814 (1901).

"Relatives" include those by marriage as well as by blood,[14] but not an illegitimate child.[14a] Under a policy which directs payment to any relative of the insured, or to any person equitably entitled to it by having incurred expenses on behalf of the insured, a son of the insured not designated as beneficiary can not enforce payment although he has paid the premiums. A suit can only be maintained by the executor or administrator of the insured, with whom the contract was made.[15]

The provision does not give such persons a vested interest as beneficiaries; it merely gives the company an option to pay the insurance to them.[16] Where the policy is payable to the "executors, administrators or assigns of the insured, unless settlement shall be made under the provisions of article second, hereinafter contained," and this article provides that "the company may pay the sum of money insured hereby to any relative by blood or connection by marriage of the insured, or to any other person appearing to said company to be equitably entitled to the same by reason of having incurred expenses in any way or on behalf of the insured for his or her burial, or for any other purpose," the company may pay the policy to the widow of the insured, and, in the absence of fraud, this will discharge its obligation.[17]

The word "heirs" describes those who take under the statute of descent and distribution. By the weight of authority, when used in an instrument to designate the persons to whom personal property is thereby transferred, given, or bequeathed, and the context does not explain it otherwise, it means those who would under the statute of distribution be entitled to the personal estate in the event of death or intestacy.[18] It generally includes the widow, but does not include executors.[19]

A wife who is separated from her husband may receive benefits under a certificate which the insured is entitled to hold for the benefit of his family.[20]

[14] Simcoke v. Grand Lodge, 84 Iowa 383 (1892).

[14a] Lavigne v. Ligue des Patriotes, 178 Mass. 25, 54 L. R. A. 814 (1901).

[15] Lewis v. Metropolitan L. Ins. Co. (Mass.), 59 N. E. 439 (1901).

[16] Wokal v. Belsky, 53 App. Div. (N. Y.) 167, 65 N. Y. Supp. 815 (1900).

[17] American Security, etc., Co. v. Prudential Ins. Co., 16 App. Cas. (D. C.) 318 (1900).

[18] Johnson v. Knights of Honor, 53 Ark. 255 (1890), and cases cited.

[19] Loos v. John Hancock, etc., Ins. Co., 41 Mo. 538 (1867).

[20] Smith v. Boston, etc., Ass'n, 168 Mass. 213, 46 N. E. 626 (1897).

The words "legal representatives" refer to the executors and administrators[21] rather than to the heirs or next of kin of the insured.[22] But this is not always true. Thus it was said in Minnesota:[23] "Notwithstanding the loose, inaccurate and apparently contradictory use of terms in the application and policy, we are satisfied that the heirs (including the widow) of the deceased are the beneficiaries of the policy, and that the words 'legal representatives,' as used therein, must be construed as meaning heirs or next of kin, and not executors or administrators. It is always permissible to construe these words in that way, especially in wills and policies of life insurance, wherever it is apparent from the context or subject-matter that they were used in that sense. They will be construed in that way more readily in policies of life insurance than in almost any other kind of instrument for the reason that such insurance is very commonly intended as a provision for the family of the insured. A controlling fact in this case is, that whenever the words 'personal representatives' are used, they have reference not to the person entitled merely to receive the money, but to those for whose 'benefit' or 'use' the policy is taken or the money is payable. It is not to be supposed that the insured intended his executors or administrators personally to be the beneficiaries of the policy."

So, it was said in Maryland:[24] "The term 'legal representatives' is not necessarily restricted to the personal representatives of one deceased, but is sufficiently broad to cover all persons who, with respect to his property, stand in his place, and represent his interests, whether by transfer by his own act or by operation of law. It may in this case include assigns as well as executors and administrators."

Where the policy is payable to "estate," it is collectible by the legal representatives of the insured.[25] The surrender value of a policy

[21] Johnson v. Van Epps, 110 Ill. 551 (1884); Sulz v. Mutual, etc., Ass'n, 145 N. Y. 563 (1895).

[22] Pittel v. Fidelity, etc., Ass'n, 86 Fed. 255, 30 C. C. A. 21 (1898).

[23] Schultz v. Citizens', etc., Ins. Co., 59 Minn. 308 (1894), and cases cited.

[24] Robinson v. Hurst, 78 Md. 59, 20 L. R. A. 761 (1893); quoted from New York, etc., Ins. Co. v. Flack, 3 Md. 341, 56 Am. Dec. 742 (1852); approved in New York, etc., Ins. Co. v. Armstrong, 117 U. S. 591 (1886). In Griswold v. Sawyer, 125 N. Y. 411 (1891), it was held that a policy payable to his "legal representatives" can only be assigned by the consent of the beneficiary named therein, and the term "legal representative" as employed in the policy means the children or heirs at law of the deceased.

[25] Basye v. Adams, 81 Ky. 368 (1883).

which the statute provides shall be payable in cash, when, after the payment of two full annual premiums, the insurable interest in the life of the insured is terminated, is payable to the insured, and not to the beneficiaries named in the policy.[26]

Where the policy is for the benefit of the wife and children of the insured, and is payable to "the beneficiaries or their executors, administrators, or assigns," and "in case of the death of said beneficiary," before the death of the insured, the amount is to be paid to the executors or administrators of the insured, the personal representatives of the insured take the money only after the death of all the beneficiaries before the insured.[27]

Where the policy provides that if the assured lives beyond a certain date, a fractional part of the amount shall be payable to him, his executors, or assigns, a beneficiary who, in the absence of the assured, has paid premiums up to that time may recover the full amount of the policy upon the presumption of the death of the insured, after his absence from the state for seven years without being heard from. Should the assured thereafter return, he would be estopped from making any claim under the policy.[28]

§ 353. **Transmission of interest of beneficiary.**—By the weight of authority, where the policy is payable to a wife and children, the heirs of a child who dies before the death of the insured take the interest of such deceased child. Thus, where the policy was payable to the children of the insured if the mother was not living at his death, it was held that the children had a vested though contingent interest in the policy, and on the death of one of them before the mother's death, his interest descended to his widow and children.[29] So, where the wife insures her interest in the life of her husband for her own benefit if she survives him, otherwise for the benefit of her children, and dies during his lifetime, leaving children surviving her who also die during his life, the proceeds of the policy go to the administrator of the children, and not to the estate of the insured.[30]

[26] Hazen v. Massachusetts, etc., Ins. Co., 170 Mass. 254, 49 N. E. 119 (1898).

[27] Clark v. Dawson, 195 Pa. St. 137, 45 Atl. 674 (1900).

[28] Mutual, etc., Ins. Co. v. Martin (Ky.), 55 S. W. 694 (1900).

[29] Voss v. Connecticut, etc., Ins. Co., 119 Mich. 161, 44 L. R. A. 689, 77 N. W. 697 (1899).

[30] Millard v. Brayton, 177 Mass. 533, 59 N. E. 436, 52 L. R. A. 117 (1901). See Smith v. Ætna L. Ins. Co., 68 N. H. 405, 44 Atl. 531 (1896).

A policy was made payable to the wife of the insured if living at the time of his death, but in the event she should die before his decease, then "to their children for their use, or to their guardian if under age." At the time the policy was issued the parties had nine living children, three of whom died before their mother. Upon the death of the insured, leaving the six children surviving, the question was whether the children took each an interest in the policy immediately upon its delivery, and, if so, were the interests of the three whose deaths antedated that of their mother transmitted to their distributees and representatives. The court, following what appears to be the weight of authority, held that each child, upon the delivery of the policy, took a transmissible interest in it, and that the mother having died before the father, at his death the distributee of the dead child stood in the place of its parent and was entitled to share with the living children in the insurance fund. Quoting from an early Connecticut case, it was said:[31] "The moment this policy was executed and delivered it became property, and the title to it vested in some one. It will not be claimed that it vested in the person whose life was insured. It must have vested, then, in all, or in a part, of the payees. The payees consisted of two parties, the wife and the children. As only one could take and enjoy the property ultimately, it did not vest in all as tenants in common, nor did it vest in either so as to give a right to the present enjoyment of it. It was not, however, a mere expectancy nor a naked possibility, but it was a possibility coupled with a present interest. It was visible, tangible property, and, like any other insurance policy, it was capable of assignment and had an appreciable value. Each party took a conditional, not an absolute right to the whole policy. * * * The right to the policy, in a strict sense, was not contingent; the possession and enjoyment of the fund thereby created were postponed to the future, and were contingent. This contingency applied to both parties, to the wife as well as to the children. * * * In respect to each it was then a present right to the future enjoyment of property, but it was liable to be defeated by a subsequent contingency, and was certain to be defeated as to one of them. That such a

[31] Glenn v. Burns, 100 Tenn. 295, Woodruff Ins. Cas. 372 (1898); Continental L. Ins. Co. v. Palmer, 42 Conn. 60 (1875); Estate of Conrad, 89 Iowa 396, 56 N. W. 535, 48 Am. St. 396 (1893), annotated; Hooker v. Sugg, 102 N. C. 115, 8 S. E. 919 (1889); Conigland v. Smith, 79 N. C. 303 (1878).

right is recognized as property and is transmissible to heirs is a proposition abundantly sustained by the authorities."

Other courts reject this view, and hold that on the delivery of the policy, the children then alive have a contingent interest, but say that it is not transmissible.[32]

§ 354. **Rights of beneficiary.**—In ordinary life insurance, where no power of disposition is reserved to the insured, the beneficiary, immediately upon the issuance of the policy, acquires a vested right therein which can not be impaired without his consent.[33] The rule is thus stated by the supreme court of the United States:[34] "We think it can not be doubted that in the instance of contracts of insurance with a wife or children, or both, upon their insurable interest in the life of the husband or father, the latter, while they are living, can exercise no power of disposition over the same without their consent; nor has he any interest therein of which he can avail himself, nor upon his death have his personal representatives or his creditors any interest in the proceeds of such contracts, which belong to the beneficiaries to whom they are payable. It is indeed the general rule that a policy, and the money to become due under it, belong, the moment it is issued, to the person or persons named in it as beneficiary or beneficiaries, and that there is no power in the person procuring the insurance by any act of his, by deed or by will, to transfer to any other person the interest of the person named."

In Wisconsin the insured may dispose of the policy, by will, to the exclusion of the beneficiary, when he has paid the premiums and kept control of the policy.[35]

[32] Walsh v. Mutual L. Ins. Co., 133 N. Y. 408, 31 N. E. 228, 45 N. Y. St. 123, 21 Ins. L. J. 598 (1892); United States Trust Co. v. Mutual, etc., Ins. Co., 115 N. Y. 152, 21 N. E. 1025 (1889); Continental, etc., Ins. Co. v. Webb. 54 Ala. 688 (1875).

[33] Ricker v. Charter Oak L. Ins. Co., 27 Minn. 193, 6 N. W. 771 (1880); Allis v. Ware, 28 Minn. 166 (1881); City Sav. Bank v. Whittle, 63 N. H. 587 (1885); Boyden v. Massachusetts, etc., Ins. Co., 153 Mass. 544 (1891); Lockwood v. Michigan, etc., Ins. Co., 108 Mich. 334, 66 N. W. 229 (1896); Ferdon v. Canfield, 104 N. Y. 143 (1887); Brown's Appeal, 125 Pa. St. 303 (1889); Glanz v. Gloeckler, 104 Ill. 573, 44 Am. Rep. 94 (1882); Wilmaser v. Continental L. Ins. Co., 66 Iowa 417 (1885); Weston v. Richardson, 47 L. T. N. S. 514; Jackson Bank v. Williams, 77 Miss. 398, 26 So. 965 (1899); Lambert v. Penn, etc., Ins. Co., 50 La. Ann. 1027, 24 So. 16 (1898). Nature of beneficiary's interest: See Harley v. Heist, 86 Ind. 196 (1882).

[34] Central Bank v. Hume, 128 U. S. 195 (1888).

[35] Foster v. Gile, 50 Wis. 603, Woodruff Ins. Cas. 371 (1880); Berg v. Damkoehler (Wis.), 88 N. W. 606

In many states there are statutes which protect the interests of married women and their children in the proceeds of life insurance policies upon the lives of their husbands as against the claims of creditors of the husband.[37] These statutes have undoubtedly had some effect in inducing the courts to adopt the rule above stated, although it is generally accepted without reference to the statutes.[38]

This rule does not apply to certificates issued by mutual benefit associations, and beneficiaries under such certificates acquire no vested rights in the same.[39] "The essential difference between a certificate of membership of a beneficiary association and an ordinary life policy is, that in the latter the rights of the beneficiary are fixed by the terms of the policy, while in the former they depend upon the certificate and rights of the member under the constitution and by-laws of the society. In the one case the rights of the beneficiary are fixed and vested from the moment the policy takes effect; in the other they are subject to such changes as the law of the association authorizes the society and the member to make. * * * All that the beneficiary has during the life of the member, owing to his right of revocation, is a mere expectancy depending upon the will and pleasure of the holder of the certificate. This expectancy is not property."[40]

(1902). See also, Rison v. Wilkerson, 3 Sneed (Tenn.) 565 (1856); Clark v. Durand, 12 Wis. 248 (1860); Kerman v. Howard, 23 Wis. 108 (1868); Gambs v. Covenant, etc., Ins. Co., 50 Mo. 44 (1872), and cases cited in preceding notes.

[37] For consideration of these statutes, see Eadie v. Slimmon, 26 N. Y. 9 (1862); Troy v. Sargent, 132 Mass. 408 (1882); Fraternal, etc., Ins. Co. v. Applegate, 7 Ohio St. 292 (1857); Connecticut, etc., Ins. Co. v. Burroughs, 34 Conn. 305 (1867); McNeil v. United Order, 131 Pa. St. 339 (1890); Wirgman v. Miller, 98 Ky. 620, 33 S. W. 937 (1896); Smedley v. Felt, 43 Iowa 607 (1876); Ionia Co. Saving Bank v. McLean, 84 Mich. 625 (1891).

[38] New York, etc., Ins. Co. v. Ireland (Tex.), 17 S. W. 617 (1891); Hubbard v. Stapp, 32 Ill. App. 541 (1889); Ætna, etc., Ins. Co. v. Mason, 14 R. I. 583 (1885); Central Bank v. Hume, 128 U. S. 195 (1888).

[39] Thomas v. Grand Lodge, 12 Wash. 500, 41 Pac. 882 (1895); Robinson v. United States, etc., Ass'n, 68 Fed. 825 (1895); Marsh v. Supreme Council, 149 Mass. 512 (1889); Finch v. Grand Grove, 60 Minn. 308 (1895); Martin v. Stubbings, 126 Ill. 387 (1888); Presbyterian, etc., Fund v. Allen, 106 Ind. 593 (1886); Metropolitan L. Ins. Co. v. O'Brien, 92 Mich. 584 (1892); Sabin v. Phinney, 134 N. Y. 423, 31 N. E. 1087 (1892).

[40] Masonic, etc., Soc. v. Burkhart, 110 Ind. 189 (1886); Schoenau v. Grand Lodge (Minn.), 88 N. W. 999 (1902).

In some states the rule that the beneficiary may dispose of the policy does not apply to policies taken under statutes which authorize a policy to be taken out by the husband for the benefit of the wife.[41] The rule was established in New York under the original statute which made policies on the lives of husbands payable to married women free from claims of the creditors of the husbands, but under a later statute the wife may assign such a policy with the written consent of her husband.[42]

The beneficiary may also dispose of his interest in the policy by pledge,[43] mortgage,[44] or gift.[45]

§ 355. **Reservation of a right to change beneficiary.**—The contract may reserve to the insured the right to change the beneficiary at will, and when this is done the original beneficiary acquires no vested interest in the policy or its proceeds, and until after the death of the insured he has a mere expectancy.[46] This right to change the beneficiary may be reserved in the policy, certificate, or in the charter or by-laws, where the insurance is by mutual or benefit associations. In the latter case the right may be conferred by an amend-

[41] Smith v. Head, 75 Ga. 755 (1885); Godfrey v. Wilson, 70 Ind. 50 (1880); Eadie v. Slimmon, 26 N. Y. 9 (1862).

[42] Eadie v. Slimmon, 26 N. Y. 9 (1862); Brick v. Campbell, 122 N. Y. 337 (1890). See N. Y. Laws 1879, ch. 248.

[43] Martin v. Stubbings, 126 Ill. 387 (1888).

[44] Dungan v. Mutual, etc., Ins. Co., 46 Md. 469 (1877).

[45] Madeira's Appeal (Pa.), 4 Atl. 908 (1886). A beneficiary who murders the insured can not recover on the policy. In Holdom v. Ancient Order, etc., 159 Ill. 619, 43 N. E. 772 (1896), the court said: "The only question of law presented in this record is, does an insane beneficiary in a life insurance policy, who kills the insured under such circumstances as would cause the killing to be murder if the beneficiary were sane, thereby forfeit his right to recover the insurance money? This presents a question of first impression. * * * The causing of the death of the insured by felonious means by a sane assignee of a policy of life insurance, has been held sufficient to defeat a recovery on the policy: New York Ins. Co. v. Armstrong, 117 U. S. 591 (1886); Prince, etc., Ass'n v. Palmer, 25 Beav. 605 (1858). We hold: where an insane beneficiary in a life policy kills the assured under such circumstances as would cause the killing to be murder if the beneficiary were sane, such killing does not cause a forfeiture of the policy nor bar his right of recovery for the insurance money."

[46] Hopkins v. Northwestern L. Assur. Co., 99 Fed. 199, 40 C. C. A. 1 (1900); Bilbro v. Jones, 102 Ga. 161, 29 S. E. 118 (1898).

ment to the by-laws, which by its terms may act retroactively on certificates issued before such amendment.[47]

In ordinary life policies the beneficiary takes a vested interest the moment the policy is issued, and the insured can not change the beneficiary unless the express power to do so is reserved. It is equally well settled that when the right to change the beneficiary is reserved, in either the ordinary contract or a benefit certificate, the beneficiary named acquires no vested interest until the death of the insured, and prior to that time the insured may change the beneficiary at will.[48]

In this respect there is a material difference between an ordinary policy of life insurance and a benefit certificate issued by a fraternal organization. The general rule is that the power to change the beneficiary in the latter case is vested in the member of the society, in the absence of any restrictions in the charter, statute, by-laws, or certificate. In a recent case in Iowa, Chief Justice Kinne said:[49] "Appellant contends that the insured in the case at bar is given no authority by the certificate, by-laws or articles of incorporation to change the beneficiary; hence the beneficiary named in the certificate had a vested interest in it the moment it was issued. In other words, he says that no right has been reserved to the insured in the contract or laws of the association to change the beneficiary; therefore, none exists; and the rights of the beneficiary would be the same, as to the assignment of the policy, as in the case of an ordinary life policy. Appellant's conclusions do not necessarily follow, even if the fact be as he claims. It is true that the rights of the assured are to be determined from the contract, and the contract embraces the certificate, by-laws, articles of incorporation, stat-

[47] Catholic Knights v. Franke, 137 Ill. 118 (1891); Fugure v. Mutual Society, 46 Vt. 360 (1874). But see Thibert v. Supreme Lodge, 78 Minn. 448, 81 N. W. 220 (1899); Supreme Commandery, etc., v. Ainsworth, 71 Ala. 436 (1882); Pellazzino v. German, etc., Soc., 16 W. L. B. (Ohio) 27, 9 Dec. R. (Ohio) 635, Woodruff Ins. Cas. 321 (1886).

[48] Smith v. National Ben. Soc., 123 N. Y. 85, 9 L. R. A. 616 (1890); Hamilton v. Royal Arcanum, 189 Pa. St. 273, 42 Atl. 186 (1899); Mente v. Townsend, 68 Ark. 391, 59 S. W. 41 (1900).

[49] Carpenter v. Knapp, 101 Iowa 712, 70 N. W. 764, 38 L. R. A. 128 (1897) [citing Masonic, etc., Soc. v. Burkhart, 110 Ind. 189 (1886); Presbyterian, etc., Fund v. Allen, 106 Ind. 593 (1886); Thomas v. Grand Lodge, 12 Wash. 500, 41 Pac. 882 (1895); Hoeft v. Supreme Lodge, 113 Cal. 91, 33 L. R. A. 174 (1896); Voigt v. Kersten, 164 Ill. 314 (1896); Fischer v. American L. of H., 168 Pa. St. 279 (1895)].

ute law, if any, either providing expressly for a change of beneficiaries or prohibiting such change; * * * but by reason of the character and purpose of such associations, it should be held that the power to change the beneficiary is vested in the member insured during his lifetime."

Where the insured has the right to change the beneficiary, it is immaterial, so far as the original beneficiary is concerned, that he was induced to make the change by fraud.[50]

[50] Hoeft v. Supreme Lodge, 113 Cal. 91, 33 L. R. A. 174 (1896). In this case the court said: "Defendants do not plead any contract with their deceased father, or any special equities which would deprive him of the right to make a change, but stand upon the ground that they may contest because the change was procured by fraud. But, if it was a fraud, did they have a right to complain? Clearly they had not, unless either by contract or in law they had some vested interest or right in the certificate which had formerly been taken out in their favor. They claim no such vested interest by contract. If it exists at all then, it exists by operation of law. But such rights are either constitutional or statutory, and we are referred to no law which secures to them a right of action for such cause. If they had a vested right in the certificate as such, then the insured himself, of his own volition, and without the fraudulent contrivance of a third person, could not substitute a new beneficiary. But this is not and can not be claimed, for the contract is between the order and the insured. The beneficiary's interest is the mere expectancy of an incompleted gift, which is revocable at the will of the insured, and which does not and can not become vested as a right until fixed by his death. If it is said that a devisee under a will has, during the life of the testator, a like naked expectancy, it may be freely conceded that it is so; but to the heirs and devisees is confirmed a right of action for fraud, etc., by the provisions of the Code. Otherwise, they, too, would come within the scope of the general principle that a right of action for fraud is personal and untransferable. One can not be defrauded of that in which he has no vested right. A vested right is property, which the law protects, while a mere expectancy is not property, and therefore is not protected. These views will be found supported without conflict by a multitude of authorities, from which may be cited: Niblack Vol. Soc. & Mut. Ben. Ins. (2d ed.), § 234a; Brown v. Grand Lodge, 80 Iowa 287 (1890); Schillinger v. Boes, 85 Ky. 357 (1887); Robinson v. United States, etc., Ass'n, 68 Fed. 825 (1895); Supreme Conclave v. Cappella, 41 Fed. 1 (1890); Lamont v. Grand Lodge, 31 Fed. 177 (1887); Knights of Honor v. Watson, 64 N. H. 517 (1888); Beatty's Appeal, 122 Pa. St. 428 (1888); Martin v. Stubbings, 126 Ill. 387 (1888). In our own state the cases of Swift v. San Francisco Stock, etc., Board, 67 Cal. 567 (1885); Order of Mutual Com-

§ 356. **Manner of changing beneficiary.**—A change in the beneficiary in a mutual benefit certificate must be made in the manner provided by the rules of the society, and any material departure therefrom will invalidate the transaction.[51] To this rule there are several exceptions:[52]

(1) If the society has waived a strict compliance with its rules, and, in pursuance of a request of the insured to change his beneficiary, has issued a new certificate to him, the original beneficiary will not be heard to complain that the course indicated by the regulations was not pursued.[53]

(2) If it is beyond the power of the insured to comply literally with the regulations, a court of equity will treat the change as having been made.

(3) If the insured has pursued the course pointed out by the laws of the association and has done all in his power to change the beneficiary, but before a new certificate is actually issued he dies, a court of equity will decree that to be done which ought to be done, and act as though the certificate had in fact been issued.[54]

A change of beneficiaries may be made by will in which the proceeds of the certificate are bequeathed to a certain person named. Where this was done the court said that, "in case the certificate is destroyed without fraud of the insured, so that it is impossible to

panions v. Griest, 76 Cal. 494 (1888); Bowman v. Moore, 87 Cal. 306 (1890), and McLaughlin v. McLaughlin, 104 Cal. 171 (1894), recognize the same general principles. Jory v. Supreme Council, 105 Cal. 20, 26 L. R. A. 733 (1894), and cases involving a like consideration, differ radically from the case at bar."

[51] Berg v. Damkoehler (Wis.), 88 N. W. 606 (1902); Milner v. Bowman, 119 Ind. 448, 5 L. R. A. 95 (1889), annotated; Duvall v. Goodson, 79 Ky. 224 (1880); Masonic, etc., Soc. v. Burkhart, 110 Ind. 189 (1886); National, etc., Soc. v. Lupold, 101 Pa. St. 111 (1882), and cases there cited.

[52] Supreme Conclave v. Cappella, 41 Fed. 1, Woodruff Ins. Cas. 381 (1890).

[53] National, etc., Soc. v. Lupold, 101 Pa. St. 111 (1882); Duvall v. Goodson, 79 Ky. 224 (1880); Presbyterian, etc., Fund v. Allen, 106 Ind. 593 (1886); Supreme Council v. Perry, 140 Mass. 580 (1886); Martin v. Stubbings, 126 Ill. 387 (1888); Wendt v. Iowa L. of H., 72 Iowa 682 (1887); Holland v. Taylor, 111 Ind. 121 (1887). As to waiver by insurer, see Schoenau v. Grand Lodge (Minn.), 88 N. W. 999 (1902).

[54] Heydorf v. Conrack, 7 Kan. App. 202, 52 Pac. 700 (1898); Jinks v. Banner Lodge, 139 Pa. St. 414 (1890); Hirschl v. Clark, 81 Iowa 200, 9 L. R. A. 841 (1890); Schmidt v. Iowa, etc., Ass'n, 82 Iowa 304, 11 L. R. A. 205 (1891). See further, cases collected in note to Grand Lodge v. Noll, 90 Mich. 37, 51 N. W. 268, 15 L. R. A. 350 (1892).

exercise the right of naming a new beneficiary in accordance with the methods prescribed by the by-laws of the corporation, a court of equity will recognize a designation of the beneficiary by any other method which may manifest his intention to exercise the right which he unquestionably possessed, of changing the beneficiary."[55]

§ 357. Right to proceeds—Bankruptcy.—The present bankruptcy law provides that where the bankrupt has an insurance policy which has a cash surrender value payable to himself, his estate, or legal representatives, he may, within thirty days after such surrender value has been ascertained, pay the amount thereof to the trustee, and keep the policy free from all claims of creditors. If he does not do this the policy passes to the trustee as assets for the benefit of his creditors. If the policy has no surrender value the trustee has no interest therein, and it is immaterial that the bankrupt has within four months prior to the filing of the petition in bankruptcy assigned such policy to his wife.[56]

II. Payment of Premium a Condition Precedent.

This policy does not take effect until the first premium shall have been actually paid during the lifetime of the insured. In case the said premium shall not be paid on or before the several days hereinbefore mentioned for the payment thereof, at the office of the company in the city of ———, or to agents when they produce receipts

[55] Grand Lodge v. Noll, 90 Mich. 37, 51 N. W. 268, 15 L. R. A. 350 (1892); Grand Lodge v. Child, 70 Mich. 163, 38 N. W. 1 (1888).

[56] Morris v. Dodd, 110 Ga. 606, 50 L. R. A. 33 (1900), with complete collection of cases in note. "A policy of insurance on the life of a bankrupt which has no cash surrender value, and no value for any purpose except the contingency of its being valuable at the death of the bankrupt if the premiums are kept paid, does not vest in the trustee as assets of the estate:" Re Buelow, 98 Fed. 86 (1899). Policy payable to the insured if living, otherwise to his estate: See Re Lange, 91 Fed. 361 (1899). Policy payable to the insured if living, otherwise to his wife or children: Re Boardman, 103 Fed. 783 (1900); Re Diack, 100 Fed. 770 (1900); Bassett v. Parsons, 140 Mass. 169, 3 N. E. 547 (1885). As to the rights of creditors when the policy is taken by a solvent creditor and made payable to his wife, see Central Bank v. Hume, 128 U. S. 195 (1888). See review of this case by Prof. Williston in 25 Am. Law Rev. 185 (1891), where the authorities are cited. See, also, Pullis v. Robison, 73 Mo. 201 (1880).

signed by the president or treasurer, then, and in every such case, this policy shall cease and determine, subject to the provisions of the company's non-forfeiture system as indorsed hereon, with accompanying table.

§ **358. Payment of premium—Illustrations.**—Where an insurance company delivers a policy which on its face acknowledges the receipt of the first premium, it is estopped thereafter to assert that the premium was not in fact paid.[57] The policy under consideration provides that it shall not take effect until the first premium shall have been actually paid during the lifetime of the insured. Its legal effect dates from the time of payment of the first premium, and not from the date it bears.[58] But it becomes a binding contract where the agent accepts the note of the insured in pursuance of a practice which is known to the company.[59] Thus, where it appeared that upon the issuance and delivery of a policy a note was executed and delivered by the insured to the general agent of the company for the first premium, and the policy was found among the effects of the insured at the time of his death, it was held that the presumption was that the policy was delivered at the time it bore date, and that the difference between the face of the note and the amount of the premium was paid in cash or arranged for by the insured. The giving and delivery of the note and the receiving of the policy were treated as payment of the first annual premium.[60]

But the burden of proof is upon the party who asserts that a note was accepted as payment of the first premium. Where the defense was that the first premium was not paid, nor payment thereof waived,

[57] Dobyns v. Bay State, etc., Ass'n, 144 Mo. 95, 45 S. W. 1107 (1898). As to liability on a receipt for the first premium which states that the applicant is to be insured from date of the receipt, where the applicant dies before the policy is delivered, see Lee v. Union, etc., Ins. Co., 19 Ky. L. 608, 41 S. W. 319 (1897). As to effect of acceptance of premium where policy contains a provision that there is no liability unless the policy has been in force twelve months prior to the death, see Summers v. Fidelity, etc., Ass'n, 84 Mo. App. 605 (1900). See § 129, *supra*.

[58] Methvin v. Fidelity, etc., Ass'n, 129 Cal. 251, 61 Pac. 1112 (1899).

[59] Porter v. Mutual L. Ins. Co., 70 Vt. 504, 41 Atl. 970 (1898). As to what is payment, see Mallette v. British Am. Assur. Co., 91 Md. 471, 46 Atl. 1005 (1900); Baldwin v. Provident, etc., Soc., 162 N. Y. 636, 57 N. E. 1103 (1900).

[60] Thum v. Wolstenholme, 21 Utah 446, 61 Pac. 537 (1900).

and that the policy never went into effect, it was held that there could be no recovery, although the evidence showed that the application was accompanied by the applicant's ten-day note for the amount of the first premium, together with a memorandum indorsed on the note that it was to be returned if not accepted; that the application and the policy both provided that the insurance should not become binding until the first premium was actually paid, but that the risk was accepted by a general agent having power to bind the company by a waiver of this provision; that the agent, upon receiving the policy and the customary voucher or receipt, tendered them to the applicant and demanded payment of the note; that the maker excused the non-payment, and the agent delivered the policy to him, but retained the voucher and note; that the agent then left the note with the voucher in a bank for collection, with instructions that the voucher be delivered upon the payment of the note; that at the maker's request the time for the payment of the note was extended, such extension being made, however, as an extension of the time for the payment of the premium; and that the applicant died without paying the note. Evidence that the note was taken to "tie up" the insured does not show or even tend to show that the obligation to pay should be deemed an actual payment. After stating the rule that the general agent of an insurance company has authority at the time of the delivery of an insurance policy to bind his principal by an agreement waiving a provision of the policy calling for the actual payment of the first premium, the court said:[61] "It is also conceded that a condition of the policy as to its not going into effect in advance of the actual payment of the first premium is fatal to the plaintiff's right to recover unless it was waived by the insurer through its agent, and that whether there was such waiver depends upon whether [the parties] expressly agreed that the former's note, given with his application for insurance, should operate as such payment."

This provision may of course be waived by the company or its duly authorized agent.[62] Thus, where the agent gave the policy to the insured, although he stated that he could not pay for it at the time, it was held that the company was liable on the policy where the death of the insured occurred but two months after such de-

[61] McDonald v. Provident, etc., Assur. Soc., 108 Wis. 213, 84 N. W. 154, 81 Am. St. 885 (1900), annotated.

[62] See note to Griffith v. New York, etc., Ins. Co., 40 Am. St. 105.

livery.[63] But where the policy provided that it should not go into effect until the first premium had been actually received by the company or its authorized agent during the good health of the applicant, and further that no agent of the company had power to make, alter, or discharge contracts, or grant credit, and that no alteration of the terms of the contract should be valid unless in writing and signed by the president of the association, it was held that an agent of the company could not waive payment of the premium during the good health of the insured, as this was a condition precedent to the liability of the association.[64]

Where the company retains a note for the unearned premiums after its maturity and sends it to an attorney for collection, it waives the forfeiture provided for in the policy for failure to pay such note at maturity.[65] But where the policy exempts the company from liability while a premium note remains past due and unpaid, it is not revived by a confession of judgment on the note.[66]

If the company accepts a note for the first annual premium, and delivers the policy, it is a payment of the premium, although the note is never paid.[67] Thus, where the policy provided that it should not take effect until the first premium had been actually paid during the lifetime and good health of the insured, and that agents could not alter or discharge a contract, or receive for premiums anything but cash, and the local agent accepted a note for the premium which was unpaid at the death of the insured, and it appeared that the general agent of the company for several years prior to the time of the issuing of the policy had permitted such local agents to accept

[63] Berliner v. Travelers' Ins. Co., 121 Cal. 451, 53 Pac. 922 (1898). See, also, as to waiver, Haupt v. Phœnix, etc., Ins. Co., 110 Ga. 146, 35 S. E. 342 (1900); Sick v. Covenant, etc., Ins. Co., 79 Mo. App. 609 (1899); Griffin v. Prudential Ins. Co., 43 App. Div. (N. Y.) 499 (1899); New York, etc., Ins. Co. v. Scott, 23 Tex. Civ. App. 541, 57 S. W. 677 (1900). As to effect of agreement of agent to change date of premium payment, see Mutual L. Ins. Co. v. Clancy, 111 Ga. 865, 36 S. E. 944 (1900).

[64] Reese v. Fidelity, etc., Ass'n, 111 Ga. 482, 865, 36 S. E. 637, 944 (1900).

[65] Union Cent., etc., Ins. Co. v. Moreland (Ky.), 56 S. W. 653 (1900).

[66] Proebstel v. State Ins. Co., 14 Wash. 669, 45 Pac. 308 (1896). As to construction of forfeiture clause in a premium note, see Union, etc., Ins. Co. v. Buxer, 62 Ohio St. 385, 57 N. E. 66 (1900). See § 130, *supra*.

[67] Stewart v. Union, etc., Ins. Co., 155 N. Y. 257, 49 N. E. 876 (1897); Thum v. Wolstenholme, 21 Utah 446, 61 Pac. 537 (1900).

notes for premiums, and that the insured had previously taken out like policies in the same company through the same agent and given notes for premiums, which were collected by the general agent, it was held that the local agent had authority to waive the provision which required the payment of the premium in cash.[68]

The burden is on the party claiming under the policy to show that the first premium has in fact been paid, or the payment waived, and it is not sufficient for him to show the execution of a note for the amount, which recites that it is accepted on condition that if not paid at maturity, the policy shall be void.[69]

Payment to an agent is sufficient under a policy which provides that if payment is not made into the home office within thirty days after the date of the policy, it shall be void and of no effect.[70] It was held in North Carolina that the time of mailing a check for the premium on an insurance policy is the time of payment,[71] although it does not reach the company until past due.[72] So, the placing of a policy of life insurance in the mail with postage prepaid, so that it would in due course reach the insured before he was taken sick, is a delivery of the policy within the meaning of a provision to the effect that it shall not be in force until "the payment in cash of the first premium and the delivery of the policy to the applicant during his life and in good health."[73]

Under the New York statute it was held that notice of the maturing of a premium, properly mailed as required, which never reached the insured, did not prevent a forfeiture of the policy for non-payment of the premium when it was due.[74]

§ 359. Time when premium is due—Construction by agent—Estoppel.—In a recent case the supreme court considered the question of the power of an agent to waive the condition of the policy with

[68] Provident, etc., Soc. v. Oliver, 22 Tex. Civ. App. 8, 53 S. W. 594 (1899).

[69] Manhattan, etc., Ins. Co. v. Myers, 22 Ky. L. 875, 59 S. W. 30 (1900).

[70] Pulaski, etc., Ins. Co. v. Dawson, 87 Ill. App. 514 (1900).

[71] Kendrick v. Mutual, etc., Ins. Co., 124 N. C. 315, 32 S. E. 728 (1898).

[72] Hollowell v. Life Ins. Co., 126 N. C. 398, 35 S. E. 616 (1900).

[73] Mutual, etc., Ass'n v. Farmer, 65 Ark. 581, 47 S. W. 850 (1898).

[74] McConnell v. Provident, etc., Ass'n, 92 Fed. 769 (1899). See § 129, *supra*. As to construction of the New York statute requiring notice of maturity of premium, see article by Robert J. Brennen in 52 Cent. L. J. 4.

reference to the payment of the premium, and the duty of the insured to read the policy. An application was made on December 12, and the policy was dated December 18. The premium was paid and the policy delivered on December 26, 1893, and the agent stated to the insured that under certain provisions the policy would be in force for thirteen months from the time of the payment of the first premium. By the terms of the policy the next premium was payable on December 12, 1894, with thirty days' grace, making January 12, 1895, the last day for payment. The insured died January 18, 1895, having paid but the one premium. It appeared that the insured had the policy in his possession after its delivery, and the company claimed that his representatives were estopped from denying that the date of the contract was not that which appeared on the face of the policy, or that the words, "Please date policy same as application," were not in the application when it was signed by the insured, and that by accepting the policy the insured waived his right to object if the words were inserted as alleged, after the signing of the application. The policy on its face expressly required payment of the premium on December 12 of each year.

Chief Justice Fuller said:[75] "The insured was justified in assum-

[75] McMaster v. New York L. Ins. Co. (U. S.), 22 Sup. Ct. 10 (1901). For the earlier course of this litigation, see McMaster v. New York, etc., Ins. Co., 78 Fed. 33 (1897); New York, etc., Ins. Co. v. McMaster, 87 Fed 63, 30 C. C. A. 532 (1898); Central Trust Co. v. Continental Trust Co., 171 U. S. 687 (1898); McMaster v. New York, etc., Ins. Co., 90 Fed. 40 (1898). As to the construction of contract by agent, the court said: "In Continental L. Ins. Co. v. Chamberlain, 132 U. S. 304, 33 L. ed. 341, 10 Sup. Ct. 87 (1889), it was decided that a person procuring an application for life insurance in Iowa became by force of the statute the agent of the company in so doing, and could not be converted into the agent of the assured by any provision in the application. In that case the applicant was required to state whether he had any other insurance on his life. He was in fact a member of several co-operative associations, and therefore did have other insurance; but the soliciting agent of the company, to whom he stated the facts, believing that insurance of that kind was not insurance within the meaning of the question, wrote 'No other' as the proper answer, at the same time assuring the applicant that it was such. And this court held that the company was bound by the interpretation put upon the question by its soliciting agent. When, then, McMaster signed these applications he understood, and the company by its agent understood, that if the risks were accepted at the home office he would, by paying one year's premium in full, obtain contracts of insurance which could not be forfeited until after the expiration of thirteen months."

ing, and on the findings must be held to have assumed, that if he paid the first annual premium in full he would be entitled to one year's protection, and to one month of grace in addition—that is, to thirteen months' immunity from forfeiture. And the findings show that the company, by its agent, gave that meaning to the clause, and that McMaster was induced to apply for the insurance by reason of the protection he supposed would be thus obtained. Bearing in mind that McMaster had made no request of the company in respect of antedating the policies, and was ignorant of the interpolation of the agent, and ignorant in fact, and not informed or notified in any way, of the insertion of December 12 as the date for subsequent payments, he had the right to suppose that the policies accorded with the applications as they had left his hands, and that they secured to him, on payment of the first annual premiums in advance, immunity from forfeiture for thirteen months. And the agent assured him that this was so.

"The situation being thus, we are unable to concur in the view that McMaster's omission to read the policies when delivered to him and the payment of the premiums made, constituted such negligence as to estop the plaintiff from denying that McMaster, by accepting the policies, agreed that the insurance might be forfeited within thirteen months from December 12, 1893."[76]

III. Powers of Agent.

Nor are agents authorized to make, alter, or discharge this or any other contract in relation to the matter of this insurance, or to waive any forfeiture hereof, or to grant permits.

§ 360. **Agents.**—The effect of this provision in a policy has been already considered. It was recently held in Missouri that an agent of a life insurance company may waive a forfeiture for non-payment of the premium, although the policy provided that there could only be a waiver of forfeiture for a breach of conditions in writing, signed

[76] Citing Supreme Lodge v. Withers, 177 U. S. 260, 44 L. ed. 762, 20 Sup. Ct. 611 (1900), and cases cited; Fitchner v. Fidelity, etc., Ass'n, 103 Iowa 276, 72 N. W. 530 (1897); Hartford Steam Boiler, etc., Co. v. Cartier, 89 Mich. 41, 50 N. W. 747 (1891).

by the president or vice-president and one of the other officers of the company, where the receipts which were given by an agent provided on their face that they should not be valid unless countersigned by the agent.[77]

Where a company whose general manager is also a director receives proofs of loss which show that the condition of the policy as to residence of the insured has been violated, and returns the proofs for minor corrections without claiming a forfeiture on account of such violation, the company is estopped from claiming a forfeiture on account thereof.[78] So, where a general agent modified a condition of the application for insurance, and the policy subsequently issued required full prepayment of the premium, by accepting a portion of the premium and giving sixty days' credit for the balance, in violation of the terms of the policy, it was held that the company was estopped to assert the invalidity of the contract, notwithstanding the fact that the policy which was issued contained a provision prohibiting the modification of its terms other than by a written agreement signed by its president or secretary. This condition appeared in the policy, but the insured was not informed of the fact that it would be in the policy when he made the application.[79]

IV. Statement of Age.

Any error made in understating the age of the insured will be adjusted by paying such amount as the premiums paid would purchase at the table rate.

§ **361. Age.**—This liberal provision of the policy relieves the insured from a forfeiture which would otherwise result from a misstatement of his age. In its absence, the understatement of his age by an applicant for life insurance increases the risk as a matter of law.[80] Thus, it was held that a statement by an applicant that his age was fifty-nine, when in fact it was sixty-four, avoided the policy.[81] A statement that the age of the applicant is thirty, when in

[77] James v. Mutual, etc., Ass'n, 148 Mo. 1, 49 S. W. 978 (1898).

[78] Kidder v. Knights Templars, etc., Co., 94 Wis. 538, 69 N. W. 364 (1896).

[79] Cole v. Union, etc., Ins. Co., 22 Wash. 26, 60 Pac. 68, 47 L. R. A. 201 (1900).

[80] Dolan v. Mutual, etc., Ass'n, 173 Mass. 197, 53 N. E. 398 (1899).

[81] Swett v. Citizens', etc., Soc., 78 Me. 541 (1886).

fact it is thirty-five, is a material variation.[82] A misrepresentation by a member of a benefit society as to his age invalidates the insurance contract, although the applicant entered the society before its constitution and regulations as to age were finally adopted.[83]

But where the applicant states his age "to the best of his knowledge and belief," and stipulates that any untrue or fraudulent statement will forfeit his right to recovery, the contract is not invalidated by the fact that he was three or four years older than he stated unless there is evidence of fraud or knowledge on his part that his statement was untrue.[84]

V. Assignment of Policy.

No assignment of this policy shall take effect until written notice thereof shall be given to the company.

§ 362. **Assignability.**—The ordinary fire insurance contract, being of a personal nature, is not assignable without the consent of the insurer, but a life insurance contract, being in the nature of a chose in action, is assignable in the absence of restrictive provisions. The accepted rule is that a policy of life insurance without restrictive words is assignable by the assured for a valuable consideration like any other chose in action where the assignment is not made to cover a mere speculative risk and thus evade the law against wager policies.[85] Payment of a policy thus assigned may be enforced by or for the benefit of the assignee.

[82] Ætna L. Ins. Co. v. France, 91 U. S. 510 (1875).

[83] Marcoux v. Society, etc., 91 Me. 250, 39 Atl. 1027 (1898).

[84] Egan v. Supreme Council, 32 App. Div. (N. Y.) 245, 161 N. Y. 650, 57 N. E. 1109 (1900).

[85] New York, etc., Ins. Co. v. Armstrong, 117 U. S. 591 (1886); Fitzgerald v. Hartford, etc., Ins. Co., 56 Conn. 116 (1888); Mutual, etc., Ins. Co. v. Allen, 138 Mass. 24 (1884); Pingrey v. National L. Ins. Co., 144 Mass. 374 (1887); Martin v. Stubbings, 126 Ill. 387 (1888); Bushnell v. Bushnell, 92 Ind. 503 (1883); New York, etc., Ins. Co. v. Flack, 3 Md. 341, 56 Am. Dec. 742 (1852); Hewlett v. Home, etc., 74 Md. 350, 17 L. R. A. 447 (1892); Bursinger v. Bank, 67 Wis. 75 (1886); Olmsted v. Keyes, 85 N. Y. 593 (1881); Steinback v. Diepenbrock, 158 N. Y. 24, Woodruff Ins. Cas. 402 (1899); Clark v. Allen, 11 R. I. 439 (1877); Falk v. Janes, 49 N. J. Eq. 484 (1892); Eckel v. Renner, 41 Ohio St. 232 (1884); Roller v. Beam, 86 Va. 512, 6 L. R. A. 136 (1899), annotated. See §§ 62, 63, *supra*.

This restriction upon the assignability of such a policy is necessary not only for the protection of the company, but for the purpose of protecting the rights of the beneficiary; and hence, if the company does not by the terms of the contract require that its consent must be given to an assignment, the beneficiary or the insured, if the right is reserved, may dispose of the policy at will.

The parties may place such restrictions upon the right to transfer the policy as they choose. A policy required the consent of the company to an assignment and provided that with such consent a policy so assigned as security for the claim of a creditor, as beneficiary, should not exceed the amount of the actual *bona fide* indebtedness of the member to him existing at the time of the death of the insured, together with any payments made to the association upon the certificate or policy of insurance by such creditor, with interest thereon, and "this certificate or policy of insurance as to all amounts in excess thereof shall be null and void." It was held that the original beneficiary had parted with all his interest in the policy by the assignment.[86] "The condition in that regard may be considered harsh," said Marshall, J., "but courts must enforce contracts as they find them. If a person sees fit to make an insurance contract so that an assignment thereof to one of his creditors will have the effect of limiting all liability thereon to the amount due such creditor from him at the time of his death, there is no law to prevent it, and he and those who come after him must abide thereby. There can be no question but that an insurance company may, by contract, place such restraints upon the assignment of its insurance policies as it sees fit, not inconsistent with its own laws or some statute. We can not escape the conclusion that, by the terms of the contract before us, respondent must suffer, as the penalty for the assignment of the policy, the loss of all interest therein. This is as plainly stipulated in the policy as language can make it. The effect thereof, and of the assignment, was to substitute a new contract for the policy as originally written, with like conditions, except that the liability of the insurer was limited solely to the 'assignee,' and to the amount due the assignee from M. at the time of his death, including payments by it to keep up the policy, and interest thereon, not exceeding in all the amount payable under the contract in the absence of the assignment."

[86] McQuillan v. Mutual, etc., Ass'n (Wis.), 87 N. W. 1069 (1901). The limitation applies to an assignment as collateral security: McQuillan v. Mutual, etc., Ass'n (Wis.), 88 N. W. 925 (1902).

§ 363. **Notice to company.**—The provision above quoted does not prohibit the assignment of the contract, but provides that no assignment thereof shall take effect until written notice thereof shall be given to the company. It is sometimes held to be merely directory and not to affect the legality of the transfer as between the insurer and the assignee of the policy. Certainly no one but the insurer can question the validity of the assignment where no notice is given.[87]

The clause does not, like that contained in many policies, provide that an assignment without the consent of the company shall be void. As said in a Minnesota case,[88] where the policy contained a somewhat similar provision, "the consent of the company to an assignment is not necessary. All that is required is that the assignment be in writing on the policy and a copy of it furnished to the company within thirty days. This provision is not one which is intended to guard against an increase of risk, and does not go to or infuse itself into the essence of the contract. Its sole purpose is to protect the company against the danger of having to pay the policy twice, by requiring written evidence of any change of beneficiaries to be put in reliable form and promptly furnished to the company. All that could, at the very most, be claimed as the effect of non-compliance with this stipulation is that the company might disregard an attempted assignment and pay the money to the original beneficiary; in other words, such attempted assignment would be merely voidable at the option of the company."[88]

The clause will not prevent the vesting of an equitable interest in the proceeds of the policy in an assignee who has an interest in the continuance of the life of the insured.[89]

In Tennessee the court said:[90] "The question as to the necessity of the knowledge and assent of the underwriters to an assignment of the policy is very different with reference to fire policies from life and marine policies. The assent of the company to an assignment, in order to give it validity as against the office in case of a fire policy, is generally admitted; and notice of assignment must, therefore, be

[87] Embry's Adm'rs v. Harris, 21 Ky. L. 714, 52 S. W. 958 (1899).

[88] Hogue v. Minnesota Pack., etc., Co., 59 Minn. 39, 60 N. W. 812 (1894).

[89] Travelers' Ins. Co. v. Grant, 54 N. J. Eq. 208, 33 Atl. 1060 (1896).

[90] Mutual, etc., Ins. Co. v. Hamilton, 5 Sneed (Tenn.) 269 (1857); Robinson v. Cator, 78 Md. 72 (1893); New York, etc., Ins. Co. v. Flack, 3 Md. 341, 56 Am. Dec. 742 (1852).

given or the assignee will not be entitled to demand the insurance money. The reason for this requirement in fire policies is obvious. In such cases the personal character of the insured for integrity and prudence is a most important consideration. In the language of the books, there is infused into the contract of fire insurance something of the nature of a choice of persons. The insurer might be quite willing to underwrite a policy for one person, but not that of another of different character and habits. The known reputation of the insured might be a guarantee that he would not secretly destroy his own property with a view to recover the insurance money, while that of the assignee might furnish no such assurance. But no such risk exists in case of an insurance on the life of an individual, nor in case of marine policies. In the latter case the assent of the insurer to an assignment of the policy or notice of such assignment is not indispensable, in order to entitle the assignee of the policy to recover the money of the insurer. We are of the opinion, therefore, that, as between the insurer and the assignee of a life policy, notice of assignment is not required to complete the right of the latter to receive the insurance money from the former."

There are decisions, however, to the effect that the company is entitled to the full benefit of this provision of the contract on the theory that it is intended to prevent speculative insurance.[91] Thus, it was said in Massachusetts that, "as the policy of the law accords with its purpose, the court will not regard with favor any rights sought to be acquired in contradistinction to the provision."[92]

At the most, a failure to give the required notice invalidates an attempted assignment, but does not avoid the policy.[93] A notice given within a reasonable time after an assignment is sufficient, although the insured may have died in the meantime.[94]

The provision requiring the consent of the company, "in case of an assignment" of a benefit certificate, does not apply to a change of beneficiaries.[95] Such a provision in a policy, which is payable to the

[91] Stevens v. Warren, 101 Mass. 564 (1869); Moise v. Mutual, etc., Ass'n, 45 La. Ann. 736 (1893).

[92] Stevens v. Warren, 101 Mass. 564 (1869).

[93] Marcus v. St. Louis, etc., Ins. Co., 68 N. Y. 625 (1877).

[94] New York, etc., Ins. Co. v. Flack, 3 Md. 341, 56 Am. Dec. 742 (1852). The requirement that notice shall be given the company and its consent obtained may, of course, be waived by the company: Anthony v. Massachusetts Ben. Ass'n, 158 Mass. 322 (1893).

[95] Carpenter v. Knapp, 101 Iowa 712, 38 L. R. A. 128 (1897).

executor or administrator of the insured, with the right to the company at its option to pay the benefit to any of a certain class of persons who should be equitably entitled thereto by reason of having incurred expenses for the benefit of the insured, does not prevent the assignment of a policy by the insured in the absence of its exercise of the option thus reserved.[96]

Under the New York statute, which authorizes a married woman to insure her husband's life for her sole use, a policy was held not assignable. The court said: "Policies of life insurance in favor of the wife on the life of the husband we have persistently held to be unassignable. We determined that their peculiar character and purpose necessarily took from them the chief and most important characteristic of property in general."[97] But a subsequent law authorizes the assignment of such a policy with the written consent of the husband.[98] Under this statute it was held that an assignment was valid where it appeared that the husband gave his oral consent and the assignment was for a consideration received by him for the purpose of enabling him to maintain his business and support a family.[99]

Where a statute authorizes a married woman to sell and convey any of her personal property, she may sell and convey her right to recover upon a policy of life insurance in which she is the beneficiary.[100]

§ 364. **Manner of making assignment.**—As the intention of the parties must govern, a transfer of the policy by delivery, with verbal directions as to the disposition of the proceeds, is a good assignment,[101] notwithstanding the fact that the policy requires the trans-

[96] Prudential Ins. Co. v. Young, 14 Ind. App. 560, 43 N. E. 253 (1896).

[97] Eadie v. Slimmon, 26 N. Y. 9 (1862); Baron v. Brummer, 100 N. Y. 372 (1885); Dannhauser v. Wallenstein, 65 N. Y. Supp. 219, 52 App. Div. (N. Y.) 312 (1900). A contrary conclusion was reached under similar statutes in Maryland in Emerick v. Coakley, 35 Md. 188 (1871).

[98] See Dannhauser v. Wallenstein, 65 N. Y. Supp. 219, 52 App. Div. (N. Y.) 312 (1900), under Laws 1879, ch. 248.

[99] Dannhauser v. Wallenstein, 60 N. Y. Supp. 50 (1899).

[100] Supreme Assembly v. Campbell, 17 R. I. 402, 13 L. R. A. 601 (1891).

[101] New York, etc., Ins. Co. v. Flack, 3 Md. 341, 56 Am. Dec. 742 (1852); Chapman v. McIlwrath, 77 Mo. 38, 46 Am. Rep. 1 (1882); Hewins v. Baker, 161 Mass. 320 (1894), and cases there cited.

fer to be in writing.[102] Even delivery of the policy is not always necessary,[103] as where a written assignment is executed and delivered to the assignee, and the policy is retained by the insured.[104] A life insurance policy is assignable by parol when accompanied by a delivery.[105] A letter from the insured to the insurer, requesting that the insurance be made payable, in case of his death, to his son, is not an assignment of the contract, as under the circumstances the insured retained dominion over it, and could cancel, or, with the consent of the company, modify the same.[106]

The execution by the insured of an assignment of a policy to his mother as a gift, he retaining possession of it and notifying her that he had made the assignment, and "would keep it for her," is not a complete delivery, and the insured retains the power to make another assignment of the policy.[107] Where the policy was made payable to the administrator or executor of the insured, and the insured immediately delivered it to a creditor, saying that it was an oversight that such creditor was not named as beneficiary, and the creditor held the policy until after the death of the insured, it was held that there was a valid assignment of the policy.[108]

Even where a writing is required it is not necessary that any particular form of words be used.[109] The language must, however, be sufficient to show an intention to make the assignment, and it seems that written directions as to the manner of the disposition of the fund are not sufficient.[110]

§ 365. **Assignment of policy by assignee.**—The assignee of a policy held as collateral security for the debt of the insured can not, in the absence of a provision therefor in the instrument of assignment, either sell or surrender up the policy to the company for its cash value until he has given the insured a reasonable time to re-

[102] Hewins v. Baker, 161 Mass. 320 (1894).

[103] Burges v. New York, etc., Ins. Co. (Tex.), 53 S. W. 602 (1899). Mailing the policy is a sufficient delivery: *Ib.*

[104] Scott v. Dickson, 108 Pa. St. 6, 56 Am. Rep. 192 (1884).

[105] Hancock v. Fidelity, etc., Ins. Co. (Tenn.), 53 S. W. 181 (1899).

[106] Alvord v. Luckenbach, 106 Wis. 537, 82 N. W. 535 (1900).

[107] Weaver v. Weaver, 182 Ill. 287, 55 N. E. 338 (1899).

[108] Hancock v. Fidelity, etc., Ins. Co. (Tenn.), 53 S. W. 181 (1899).

[109] Swift v. Railway, etc., Ass'n, 96 Ill. 309 (1880).

[110] St. Clair, etc., Soc. v. Fietsam, 97 Ill. 474 (1881).

deem it.[111] But such an assignee has the right, under proper circumstances, to assign the policy to another party. Thus, one who holds a policy as collateral security for the payment of a note may assign the same to an indorsee of the note and confer on such assignee the right to hold the policy as collateral security for the note.[112] A policy of life insurance is not a negotiable instrument. Where the insured assigned a policy to H. as security for a debt, and H. subsequently assigned it to a bank as security for money borrowed, it was held that the bank took the policy subject to the equities existing in favor of the insured, unless the conduct of the latter was such as to create an estoppel, and the fact that the assignment from the insured to H. was absolute in form would not create such an estoppel. It was held, however, that the laches of the insured and his practical abandonment of the policy for eleven years by neglecting to take any active measures to recover it from H., and neglecting during all that time to pay the premiums necessary to keep it from lapsing, would estop him from asserting any rights under the policy or attempting to avail himself of its benefits as against H. or his assignee, the bank, who had kept it alive by paying the premiums at its own expense.[113]

VI. Incontestable Clause.

This policy, after two years, will be incontestable, except for non-payment of premiums.

§ 366. **Incontestable.**—This provision is neither unreasonable nor contrary to public policy.[114] There is some controversy as to whether under it the insurer can raise the question of fraud after the expiration of the period. It was recently held in Iowa that a provision making a policy absolutely incontestable from date on any ground is unlawful and invalid in so far as it relates to fraud in the procurement of the policy.[115] But the weight of authority is to the effect that such stipulation is merely in the nature of a statute of limitations, and is valid even as against the defense of fraud.[116] An

[111] Manton v. Robinson, 19 R. I. 405, 34 Atl. 148, 37 Atl. 148 (1896).

[112] Corcoran v. Mutual L. Ins. Co., 183 Pa. 443, 39 Atl. 50 (1898).

[113] Brown v. Equitable L. Assur. Soc., 75 Minn. 412 (1899).

[114] Clement v. New York L. Ins. Co., 101 Tenn. 22, 46 S. W. 561, 42 L. R. A. 247 (1898).

[115] Welch v. Union, etc., Ins. Co., 108 Iowa 224, 78 N. W. 853 (1899).

[116] Clement v. New York L. Ins.

exception is made in cases where the insured or the beneficiary has no insurable interest, and that defense, being founded on public policy, is always open to the company.[117]

The clause controls all matters which would have the effect of defeating or destroying the contract of life insurance, such as those relating to the cause of death or the habits of the insured, although it will not control matters which affect the remedy merely.[118]

A policy containing this provision is not avoided although the insured commits suicide after the expiration of the period, notwithstanding an agreement in the application that suicide is not one of the risks assumed under the policy.[119]

It applies where the company seeks to avoid liability by virtue of a clause to the effect that the policy shall be void "if the insured dies in consequence of his own criminal action."[120] In a recent Wisconsin case, it was held that the incontestable clause covered misstatements or admissions of the insured respecting his health. The court said:[121] "The incontestable clause would seem to effectually bar this defense. If this clause be not altogether a glittering generality put in for no purpose except to induce men to insure, it would seem that it must cover such misstatements or admissions as are here alleged."

In Texas it was held that a clause which provided that if the terms of the policy were complied with, it should be incontestable after one year from its date, rendered the policy incontestable for false warranties after the expiration of one year, although its language was of uncertain and doubtful meaning.[122]

Co., 101 Tenn. 22, 42 L. R. A. 247, 46 S. W. 561 (1898). See § 68, *supra*.

[117] Manufacturers' L. Ins. Co. v. Anctil, 28 Can. S. C. 103 (1897).

[118] Massachusetts, etc., Ass'n v. Robinson, 104 Ga. 256, 30 S. E. 918, 42 L. R. A. 261 (1898).

[119] Goodwin v. Provident, etc., Ass'n, 97 Iowa 226, 66 N. W. 157, 32 L. R. A. 473 (1896); Mutual Reserve, etc., Ass'n v. Payne (Tex.), 32 S. W. 1063 (1895).

[120] Sun L. Ins. Co. v. Taylor, 22 Ky. L. 37, 56 S. W. 668 (1900).

[121] Patterson v. Natural Premium, etc., Ins. Co., 100 Wis. 118, 42 L. R. A. 253, 75 N. W. 980 (1898); citing Wright v. Mutual, etc., Ass'n, 118 N. Y. 237, 23 N. E. 186 (1890); Simpson v. Life Ins. Co., 115 N. C. 393, 20 S. E. 517 (1894); Goodwin v. Provident, etc., Ass'n, 97 Iowa 226, 66 N. W. 157 (1896); Kline v. National Ben. Ass'n, 111 Ind. 462, 11 N. E. 620 (1887).

[122] Franklin Ins. Co. v. Villeneuve (Tex. Civ. App.), 60 S. W. 1014 (1901).

VII. Special Privileges.

This policy, while in force, will participate annually in the company's distribution of surplus as ordered by the directors, and the special privileges printed on the third page hereof are hereby made a part of the policy contract.

§ **367. Special privileges.**—Almost all of the policies now in use contain some such provision as that quoted above. The special privileges thus provided for, of course, differ in each policy, and, therefore, require no special consideration at this time.

VIII. Application a Part of Contract.

In consideration of the statements and agreements in the application for this policy, which are hereby made a part of this contract.

§ **367a. Provisions in the application.**—The application upon which a policy of life insurance issues is by virtue of this clause incorporated into and made a part of the contract of insurance. Statements therein contained in answer to questions of the agent of the company and its medical examiner are generally, in express words, made warranties, and, in the absence of a statute requiring a certain construction, they will be construed as warranties under the general rules already stated. The form of application used by the company whose policy we have been considering contains the following provision in addition to the answers to the specific questions:

(a) Excepted Risks.

I further agree that the policy hereby applied for shall become and be null and void if, within two years from date hereof, I shall commit suicide while sane or insane; or within such period, and without the written consent of the company, shall reside in or travel to the Philippine Archipelago or the Klondike region, or reside or travel elsewhere than in the remaining portions of the United States and Canada, or in or to Europe, or be personally engaged in blasting, mining, submarine operations, or in the making of explosives, or in the service of any railway train, or on a steam or sailing vessel, or in naval or army service in times of war.

§ 368. Suicide—Sane or insane.—In order to avoid the controversy which has arisen over the meaning of the word "suicide," the insurance companies now generally protect themselves by providing that the policy shall be void if the insured die by suicide, while sane or insane.[123] In some states this defense is forbidden unless it is made to appear that the insured contemplated suicide at the time he took out the policy.[124]

The provision is an exact and reasonable limitation upon the liability of the company, and under it the insurer is not liable, although the insured kills himself while in a condition which renders him wholly unconscious of the moral nature of the act.[125]

It covers a case where the person who commits suicide is entirely bereft of reason.[126] This rule is recognized to its fullest extent by the supreme court of the United States, which, in a leading case, said:[127] "For the purposes of this suit it is enough to say that the policy was rendered void, if the insured was conscious of the physical nature of his act, and intended by it to cause his death, although, at the time, he was incapable of judging between right

[123] An examination of the policies and applications now in use shows that almost all the leading companies now insert the words "sane or insane."

[124] Rev. St. Mo. 1879, § 5982; Rev. St. Mo. 1889, § 5855; Ætna L. Ins. Co. v. Florida, 69 Fed. 932, 16 C. C. A. 618 (1895), note; Knights Templars, etc., Co. v. Jarman, 104 Fed. 638, 44 C. C. A. 93 (1900); Wallace v. Bankers' L. Ass'n, 80 Mo. App. 102 (1899). See, also, Haynie v. Knights Templars, etc., Co., 139 Mo. 416, 41 S. W. 461 (1897). The Ohio statute providing that the company is estopped to set up certain defenses, after the lapse of three years (Rev. St., § 3626), does not estop the insurer from defending on the ground of suicide: Starck v. Union, etc., Ins. Co., 134 Pa. St. 45, 19 Atl. 703 (1890).

[125] Scherar v. Prudential Ins. Co. (Neb.), 88 N. W. 687 (1902); Tritschler v. Keystone, etc., Ass'n, 180 Pa. St. 205, 36 Atl. 734 (1897); Spruill v. Northwestern, etc., Ins. Co., 120 N. C. 141, 27 S. E. 39 (1897); Zimmerman v. Masonic Aid Ass'n, 75 Fed. 236 (1896); Kelley v. Mutual L. Ins. Co., 75 Fed. 637 (1896); Insurance Co. v. Fox, 106 Tenn. 347, 61 S. W. 63 (1901); Hart v. Modern Woodmen, 60 Kan. 678, 57 Pac. 936 (1899); Woiten v. American, etc., Ins. Co. (Tex.), 51 S. W. 1105 (1899); Scarth v. Security, etc., Soc., 75 Iowa 346, 39 N. W. 658 (1888); Leman v. Manhattan L. Ins. Co., 46 La. Ann. 1189, 15 So. 388 (1894). For some limitations, see Mutual, etc., Ins. Co. v. Daviess, 87 Ky. 541, 9 S. W. 812 (1888); Sabin v. Senate, etc., 90 Mich. 177, 51 N. W. 202 (1892).

[126] De Gogorza v. Knickerbocker, etc., Ins. Co., 65 N. Y. 232 (1875).

[127] Bigelow v. Berkshire, etc., Ins. Co., 93 U. S. 284 (1876). See, also, Connecticut, etc., Ins. Co. v. Akens, 150 U. S. 468 (1893).

and wrong and of understanding the moral consequences of what he was doing." So, it was held in Michigan that such a proviso "covers all conscious acts of the insured by which death by his own hand is compassed, whether he was at the time sane or insane. If the act was done for the purpose of self-destruction, it matters not that the insured had no conception of the wrong involved in its commission."[128] It is immaterial whether the act was deliberate or otherwise.[129] The policy is void, although the insured acts under an insane impulse which overcomes his will power.[130]

§ 369. Where there is no provision as to the effect of suicide.—The supreme court of the United States has recently held that intentional self-destruction by the assured when sane is not a risk covered by a life insurance policy even when the policy does not except such a death. It was further said that a contract of life insurance which expressly provided for payment if the insured, while sane, took his own life, would be against public policy, as it would have a tendency to tempt persons to commit suicide for the purpose of paying their debts or providing for those who are dependent upon them.[131] Before this decision, the weight of authority sustained the rule that where the contract contains no provision to the effect that suicide shall invalidate the contract, it is no defense to an action on the policy that the insured took his own life.[132] But a distinction should be made between cases where the insured kills himself for the purpose of obtaining the money for the use of his own estate, and where the money is payable to a third person as beneficiary. Thus, it was said:[133] "In the law of insurance, suicide is not as a rule recognized

[128] Streeter v. Western Union, etc., Soc., 65 Mich. 199, 31 N. W. 779, 9 Am. St. 882 (1887). See, also, Sabin v. Senate, etc., 90 Mich. 177, 51 N. W. 202 (1890).

[129] Union, etc., Ins. Co. v. Hollowell, 14 Ind. App. 611, 43 N. E. 277 (1896).

[130] Billings v. Accident Ins. Co., 64 Vt. 78, 24 Atl. 656, 17 L. R. A. 89 (1892), annotated.

[131] Ritter v. Mutual L. Ins. Co., 169 U. S. 139 (1897). See s. c. in 70 Fed. 954; 17 C. C. A. 537 (1895). See, also, Supreme Commandery v. Ainsworth, 71 Ala. 436, 46 Am. Rep. 332 (1882); Hartman v. Keystone Ins. Co., 21 Pa. St. 466 (1853). See note in 59 Am. Dec. 487.

[132] Campbell v. Supreme Conclave (N. J.), 54 L. R. A. 576 (1902); Seiler v. Economic L. Ass'n, 105 Iowa 87, 43 L. R. A. 537 (1898); Darrow v. Family Fund Soc., 116 N. Y. 537, 15 Am. St. 430, 22 N. E. 1093, 6 L. R. A. 495 (1889).

[133] Kerr v. Minnesota, etc., Soc., 39 Minn. 174, 12 Am. St. 631, 39 N. W. 312 (1888). See Mills v. Rebstock, 29 Minn. 380, 13 N. W. 162 (1882); Fitch v. American, etc., Ins. Co., 59 N. Y. 557 (1875).

as a ground of exemption from liability or for forfeiture of a policy issued for the benefit of a third person." In Pennsylvania it was recently held that suicide by the insured under a policy payable to his wife does not, in the absence of any provision on the subject, avoid the policy as against the wife.[134] This rule prevails in Iowa[135] and Illinois,[136] although it is held that suicide will avoid a policy which is payable to the assured or his personal representatives. This distinction is recognized in most of the cases.[137] Hence a policy which contains no provision with reference to forfeiture if the insured commits suicide is void, where the insured deliberately kills himself in order to secure the money for the benefit of his estate.[138] If, however, the policy is taken out with the preconceived intention, then entertained by the insured, of taking his own life for the purpose of obtaining the insurance money, the contract is void by reason of such fraud, although it contains no provision with reference to the effect of suicide.[139]

§ 370. **Suicide—Construction.**—There has been so much controversy and resulting confusion over the meaning of these words, as used without other descriptive words, that it is a relief to find the insurance companies inserting the clear and definite clause which has been quoted. Where the policy simply provides that suicide by the insured shall render it invalid, the weight of authority supports the rule established by the supreme court of the United States in the well-known Terry case.[140] The policy there under consideration required the interpretation of the phrase "death by his own hand." The court charged the jury that "if he was impelled to the act by an insane impulse which the reason that was left him did not enable him to resist, or, if his reasoning powers were so far overthrown by

[134] Morris v. State, etc., Assur. Co., 183 Pa. St. 563, 39 Atl. 52 (1897). *Contra*, Hopkins v. Northwestern L. Assur. Co., 94 Fed. 729 (1899).

[135] Parker v. Des Moines L. Ass'n, 108 Iowa 117, 78 N. W. 826 (1899).

[136] Supreme Lodge v. Kutscher, 72 Ill. App. 463 (1897).

[137] See Patterson v. Natural Prem., etc., Ins. Co., 100 Wis. 118, 75 N. W. 980 (1898), and cases there cited.

[138] Ritter v. Mutual L. Ins. Co., 70 Fed. 954, 17 C. C. A. 537 (1895).

[139] Parker v. Des Moines L. Ass'n, 108 Iowa 117, 78 N. W. 826 (1899); Smith v. National Ben. Soc., 123 N. Y. 85 (1890).

[140] Life Ins. Co. v. Terry, 15 Wall. (U. S.) 580 (1872). See, also, Mutual L. Ins. Co. v. Leubrie, 71 Fed. 843, 18 C. C. A. 332 (1895). The words "die by his own hand," or "by his own act," mean suicide: Mutual L. Ins. Co. v. Wiswell, 56 Kan. 765, 44 Pac. 996 (1896).

his mental condition that he could not exercise his reasoning faculties on the act he was about to do, the company is liable." In affirming the decision of Mr. Justice Miller at circuit, the supreme court, through Mr. Justice Hunt, said: "We hold the rule in question to be this: If the assured, being in the possession of his ordinary reasoning faculties, from anger, pride, jealousy, or a desire to escape from the ills of life, intentionally takes his own life, the proviso attaches and there can be no recovery. If the death is caused by the voluntary act of the insured, he knowing and intending that his death shall be the result of his act, but when his reasoning faculties are so far impaired that he is not able to understand the moral character, the general nature, consequences and effect of the act he is about to commit, or when he is impelled thereto by an insane impulse, which he has not the power to resist, such death is not within the contemplation of the parties to the contract, and the insurer is liable."

In a subsequent case in the same court,[141] where the policy contained a provision to the effect that "the self-destruction of the insured in any form, except upon proof that the same is the direct result of disease or accident occurring without the voluntary act of the insured" should avoid the policy, Mr. Justice Gray said: "This case is governed by a uniform series of decisions establishing the fact that if one whose life is insured intentionally kills himself when his reasoning faculties are so far impaired by insanity that he is unable to understand the moral character of his act, even if he does understand its physical nature, consequence and effect, it is not 'suicide' or 'self-destruction,' or 'dying by his own hand,' within the meaning of those words in a clause excepting such risks out of a policy and containing no further words expressly extending the exemption to such case."[142] It was held that the clause under consideration covered a case of the insured's death as the result of taking poison when his mind was so far deranged as to be unable to understand the moral character of his act, although he did understand its physical consequences.

Of course, accidental self-destruction is not suicide or self-destruc-

[141] Connecticut, etc., Ins. Co. v. Akens, 150 U. S. 468 (1893).

[142] Life Ins. Co. v. Terry, 15 Wall. (U. S.) 580 (1872); Bigelow v. Berkshire, etc., Ins. Co., 93 U. S. 284 (1876); Insurance Co. v. Rodel, 95 U. S. 232 (1877); Manhattan L. Ins. Co. v. Broughton, 109 U. S. 121 (1883); Connecticut, etc., Ins. Co. v. Lathrop, 111 U. S. 612 (1884); Accident Ins. Co. v. Crandall, 120 U. S. 527 (1887).

tion within the meaning of such provision in an insurance contract.[143] A provision in a policy that "self-destruction, sane or insane," is a risk not assumed by the company under the contract, applies only to suicide intentionally committed.[144] So, the phrase, "die by his own hand or act, voluntary or otherwise," does not include the innocent or accidental taking of an overdose of medicine.[145]

§ 371. **Presumption—Burden of proof.**—The presumption is always against the fact of suicide, and therefore, where there is a reasonable doubt whether death was due to suicide or accident, the presumption is in favor of accident.[146]

"It is a proposition of law, supported by authority as well as reason, that this and similar clauses in policies of insurance, conceding them to be valid, are not infracted by the accidental and mistaken taking of an overdose of medicine or poison or by any unintentional taking of his life by the insured.[147] The principle or rule in cases of this character is equally supported that suicide or intentional destruction by one's own hand is not presumed. The presumption is otherwise. A company interposing a defense of suicide, whether sane or insane, must overcome this presumption, and must satisfy the jury or court trying the case by a preponderance of the evidence that the self-destruction was intentional."[148] The presump-

[143] Pierce v. Travelers', etc., Ins. Co., 34 Wis. 389 (1874); Edwards v. Travelers' L. Ins. Co., 20 Fed. 661 (1884); note to Breasted v. Farmers', etc., Co., 8 N. Y. 299, 59 Am. Dec. 489 (1853).

[144] Union, etc., Ins. Co. v. Payne, 105 Fed. 172, 45 C. C. A. 193 (1900).

[145] Penfold v. Universal, etc., Ins. Co., 85 N. Y. 317, 39 Am. Rep. 660 (1881); Bachmeyer v. Mutual, etc., Ass'n, 82 Wis. 255, 52 N. W. 101 (1892); Northwestern, etc., Ins. Co. v. Hazelett, 105 Ind. 212, 4 N. E. 582 (1885); Burkhard v. Travelers' Ins. Co., 102 Pa. St. 262 (1883). See, also, Equitable, etc., Soc. v. Patterson, 41 Ga. 338, 5 Am. Rep. 535 (1870).

[146] Travelers' Ins. Co. v. McConkey, 127 U. S. 661 (1887); Connecticut, etc., Ins. Co. v. Akens, 150 U. S. 468 (1893); Ingersoll v. Knights, etc., 47 Fed. 272 (1891); Travellers' Ins. Co. v. Sheppard, 85 Ga. 751 (1890); Fidelity & C. Co. v. Freeman, 109 Fed. 847, 48 C. C. A. 692 (1901).

[147] Penfold v. Universal, etc., Ins. Co., 85 N. Y. 317, 39 Am. Rep. 660 (1881); Walcott v. Metropolitan L. Ins. Co., 64 Vt. 221, 24 Atl. 992 (1891); Phadenhauer v. Germania, etc., Ins. Co., 7 Heisk. (Tenn.) 567, 19 Am. Rep. 623 (1872).

[148] Brown v. Sun, etc., Ins. Co. (Tenn.), 51 L. R. A. 252 (1899); citing Mallory v. Travelers' Ins. Co., 47 N. Y. 52, 7 Am. Rep. 410 (1871); Cronkhite v. Travelers' Ins. Co., 75 Wis. 116, 43 N. W. 731 (1889); Walcott v. Metropolitan L. Ins. Co., 64 Vt. 221, 24 Atl. 992 (1891); Freeman v. Travelers' Ins. Co., 144 Mass.

tion against suicide is sometimes said to exist only when the insured was sane.[149]

The rule that the burden rests upon the insurance company to establish such defense affirmatively is not changed by the fact that the proofs of death furnished by the plaintiff stated the cause of death as suicide.[150] But it is incumbent on the plaintiff to show that he was mistaken when he made the statement in the proofs.[151] So, where it appeared that the death of the insured was caused by the taking of an overdose of morphine, the plaintiff prevailed because the defendant failed to prove by a preponderance of the evidence that the insured in taking the drug intended to end his own life.[152]

§ 372. **Residence and occupation.**—The provisions above quoted with reference to residence, occupation and travel are clear and specific. Where the policy prohibited residence south of a certain degree of latitude, but gave permission to pass "as a passenger by the usual routes of public conveyance to and from any port or place within the limits," it was held not to be invalidated by the fact that the insured was compelled by sickness to interrupt his journey while in a place in which travel was permitted but residence prohibited.[153]

The provision with reference to residence is waived by the reception and retention by the company of the premium after notice of a breach of the condition to an agent authorized to receive, and who did receive and retain the premium.[154]

572 (1887); Persons v. State, 90 Tenn. 291, 16 S. W. 726 (1891); Accident Ins. Co. v. Bennett, 90 Tenn. 256, 16 S. W. 723 (1891). See further, as to the presumption with reference to death by suicide, Mutual L. Ins. Co. v. Wiswell, 56 Kan. 765, 35 L. R. A. 258 (1896); Johns v. Northwestern, etc., Ass'n, 90 Wis. 332, 41 L. R. A. 547 (1895); Standard, etc., Ins. Co. v. Thornton, 100 Fed. 582, 40 C. C. A. 564, 49 L. R. A. 116 (1900); Connecticut, etc., Ins. Co. v. McWhirter, 73 Fed. 444, 19 C. C. A. 519 (1896).

[149] Mutual, etc., Ins. Co. v. Daviess, 87 Ky. 541, 9 S. W. 812 (1888). See language used in Connecticut, etc., Ins. Co. v. Akens, 150 U. S. 468 (1893).

[150] Home Ben. Ass'n v. Sargent, 142 U. S. 691 (1891); Union, etc., Ins. Co. v. Payne, 105 Fed. 172, 45 C. C. A. 193 (1900); Leman v. Manhattan L. Ins. Co., 46 La. Ann. 1189, 15 So. 388 (1894).

[151] Keels v. Mutual, etc., Ass'n, 29 Fed. 198 (1886); Dennis v. Union, etc., Ins. Co., 84 Cal. 570, 24 Pac. 120 (1890).

[152] Brown v. Sun L. Ins. Co. (Tenn.), 57 S. W. 415 (1899).

[153] Converse v. Knights Templars', etc., Co., 60 U. S. App. 288 (1898).

[154] Germania L. Ins. Co. v. Koehler, 168 Ill. 293, 48 N. E. 297 (1897).

The policy also requires the applicant, in response to a question, to state his occupation—kind of business and position. The statement with reference to occupation must be substantially true or the policy will be rendered void.[155] But a statement that the applicant is a soda-water maker, when he is in fact a soda-water seller, is not a breach of warranty.[156] Where the insured in his application stated that his occupation was that of a dry goods store-keeper, it was held that a failure to disclose that he was occasionally employed as a bevel-smoother of plate glass did not, in the absence of a fraudulent intent to mislead, invalidate the policy.[157]

§ 373. Death in violation of law or at the hands of justice.—Many insurance contracts provide that the insurer shall not be liable if the insured comes to his death at the hands of justice, or while engaged in the violation of law. The death of a woman which results from her voluntary submission to an illegal operation for abortion results from a violation of law within the meaning of this provision, and invalidates the policy.[158] So, the fact that the insured was shot by a police officer a few minutes after he had committed a robbery, and while he was attempting to escape, prevents a recovery on the policy, as the insured died in consequence of his own criminal action.[159] A by-law of an insurance company which provides that there can be no recovery should a member come to his death in consequence of a violation of a criminal law embraces any act of the insured which may be denominated a crime, although it is not a felony. But it was held that where the insured struck another with his hand, and the latter, after throwing him down, inflicted injuries from which the insured died, such death was not in consequence of a violation of a criminal law within the contemplation of the parties.[160]

When suicide is not a crime under the laws of the state, a policy which contains a clause to the effect that "it is to be void if the member herein shall die in consequence of a duel or at the hands of

[155] Dwight v. Germania L. Ins. Co., 103 N. Y. 341 (1886).

[156] Grattan v. Metropolitan L. Ins. Co., 80 N. Y. 281, 36 Am. Rep. 617 (1880); Kenyon v. Knights Templar, etc., Ass'n, 122 N. Y. 247 (1890).

[157] Perrin v. Prudential Ins. Co., 30 Misc. (N. Y.) 608, 62 N. Y. Supp. 720 (1900). See illustrations, § 395, *infra.*

[158] Wells v. New England, etc., Ins. Co., 191 Pa. St. 207, 43 Atl. 126 (1898).

[159] Prudential Ins. Co. v. Haley, 91 Ill. App. 363 (1900).

[160] Brown v. Supreme Lodge, 83 Mo. App. 633 (1900).

justice, or by any violation of or an attempt to violate any criminal law of the United States, or of any state or country in which the member herein named may be," is not invalidated although the laws of the state make an attempt to commit suicide a crime. The court said:[161] "By the act of taking his own life he violated no criminal law unless the attempt to do it may be distinguished from the act accomplished. An act is characterized by the purpose, when ascertained, of the party doing it, or by its result. If the act fails to accomplish its purpose, it constitutes an attempt; but if the result of it is the consummation of the purpose, the act is not commonly designated an attempt."

Although suicide is still technically a crime, if there is no punishment provided for either an attempted or an accomplished suicide, it is not within such a provision. Especially should this be held where the company has stricken out the usual suicide clause.[162]

A suicide committed by an alleged fugitive from justice to avoid arrest and trial for a crime is not the proximate result of the alleged crime, and hence is not within the proper meaning of the provision that "if the assured shall die in, or in consequence of, the violation of any criminal law of any country, state or territory in which the assured may be," the policy shall be void.[163]

Even though a policy contains no provision for forfeiture in the event of the execution of the insured for a crime, there can be no recovery when the insured is executed. In the oft-cited Fauntleroy case,[164] Lord Lyndhurt held that a policy assuming to insure against such a risk would be void as against public policy. This rule applies where it is alleged that the conviction was erroneous and the insured in fact innocent, as it would be equally against public policy to allow insurance against the miscarriage of justice. "A contract of life insurance, written to insure against a capital conviction in the established courts of competent jurisdiction, in the event that such conviction is unjust and unwarranted by the evidence, is void, as against public policy."[165]

[161] Darrow v. Family Fund Soc., 116 N. Y. 537, 22 N. E. 1093, 6 L. R. A. 495, 15 Am. St. 430 (1889); Meachem v. New York, etc., Ass'n, 120 N. Y. 237, 24 N. E. 283 (1890). See also, § 401, *infra.*

[162] Patterson v. Natural Prem., etc., Ins. Co., 100 Wis. 118, 75 N. W. 980, 42 L. R. A. 253 (1898).

[163] Kerr v. Minnesota, etc., Ass'n, 39 Minn. 174, 39 N. W. 312 (1888).

[164] Amicable Society v. Bolland, 4 Bligh (N. S.) 194, 211 (1830).

[165] Burt v. Union, etc., Ins. Co., 105 Fed. 419, 44 C. C. A. 548 (1900).

(b) Statements with Reference to Habits, Physical Condition, Etc.

§ **374. Habits.**—A false statement to the effect that the applicant does not drink spirituous liquors will avoid the policy.[166] Such a statement precludes a recovery although he does not use liquor excessively or intemperately, notwithstanding a statute which provides that all statements in the application shall be deemed representations and not warranties.[167] A statement that the applicant is of temperate habits does not mean that he is a total abstainer,[168] and the supreme court of the United States has held that a man may be of temperate habits although he has once had delirium tremens.[169] Where the applicant stated that he had never used narcotics, it was held that the company could not defeat liability by showing a use of narcotics which did not amount to a custom or habit.[170] Where the applicant stated that he had always been temperate, and that the last time he had consulted a physician was about a year before for influenza, and he died of influenza four months after the policy was issued, and it appeared that before the application was made he had been frequently drunk and had consulted a physician within four months for vomiting and nausea caused by drunkenness, it was held that there was a breach of a material warranty, and there could be no recovery on the policy.[171]

An applicant for insurance stated that he had never been intemperate in the use of intoxicating liquors, and in construing the statement the court said:[172] "An occasional excess in the use of intoxicating liquor does not of itself constitute a habit, and make a man intemperate within the meaning of this policy; but if the habit has been formed and is indulged in of drinking to excess and becoming

[166] Malicki v. Chicago, etc., Soc., 119 Mich. 151, 77 N. W. 690 (1899).

[167] Union, etc., Ins. Co. v. Lee, 20 Ky. L. 839, 47 S. W. 614 (1898).

[168] Van Valkenburgh v. American Ins. Co., 70 N. Y. 605 (1877).

[169] Insurance Co. v. Foley, 105 U. S. 350 (1881); disapproving Thomson v. Weems, L. R. 9 App. Cas. 671 (1884), where it was said that "temperate in habits" is a phrase to be interpreted, and though not to be taken in a Pythagorean sense as total abstinence, yet seems to import abstemiousness, or at least moderation—

"The rule of not too much,
But by temperance taught."

[170] National Fraternity v. Karnes (Tex. Civ. App.), 60 S. W. 576 (1901).

[171] Mengel v. Northwestern, etc., Ins. Co., 176 Pa. St. 280, 35 Atl. 197 (1896).

[172] Union, etc., Ins. Co. v. Reif, 36 Ohio St. 596, Woodruff Ins. Cas. 295 (1881).

intoxicated, whether daily and continuously or periodically, with sober intervals of greater or less length, a person addicted to such habit can not be said to be of temperate habits within the meaning of this policy. * * * The habit of using intoxicating liquors to excess is the result of indulging a natural or acquired appetite by continued use until it becomes a customary practice. This habit may manifest itself in practice by daily or periodical intoxication or drunkenness. Within the purview of these questions it must have existed at some previous time or at the date of the application. It is not essential to its existence that it should be continuously practiced, or that the insured should be daily and habitually under the influence of liquor. Where the general habits of the man are either abstemious or temperate, an occasional indulgence to excess does not make him a man of intemperate habits, but if the habit is formed of drinking to excess, and the appetite for liquor is indulged to intoxication, either constantly or periodically, no one may claim that his habits are temperate though he may be sober for longer or shorter periods in the intervals between the times of his debauches."

§ 375. **Health and freedom from disease.**—A statement that the applicant is in "good health" means that he is free from disease or ailments which affect the general healthfulness of his system, and not from mere indisposition, which does not tend to undermine or weaken his constitution.[173] The applicant is not required to know and state with absolute certainty his physical condition or his predisposition to different diseases, and it is sufficient that he in good faith discloses fully all that he knows about his past and present health.[174] Hence, a statement that a person is in good health, made in an application for reinstatement of a lapsed policy, does not mean that his health is absolutely perfect; but means that it was practically the same as it was when the policy was issued.[175] Sound health means freedom from disease or ailment which affects the general soundness or healthfulness of the system seriously, and the word "serious" is not generally used to describe a dangerous condition, but rather a grave, important or weighty trouble.[176]

[173] Plumb v. Penn, etc., Ins. Co., 108 Mich. 94, 65 N. W. 611 (1895).

[174] Endowment Rank v. Cogbill, 99 Tenn. 28, 41 S. W. 340 (1897); Moulor v. American L. Ins. Co., 111 U. S. 335 (1884).

[175] Massachusetts, etc., Ass'n v. Robinson, 104 Ga. 256, 30 S. E. 918, 42 L. R. A. 261 (1898).

[176] Brown v. Metropolitan L. Ins. Co., 65 Mich. 306, 32 N. W. 610 (1887); Metropolitan L. Ins. Co. v.

A temporary indisposition such as an ordinary cold is not an illness within the meaning of that word as used in an application for a policy.[177] A man who has a cold, on account of which he is in bed, may be in good health within the meaning of such a clause, and this is not affected by the fact that he was taken with pneumonia and died a few days after the premium was paid.[178] Where the applicant, in answer to a question whether he had ever had any "illness, local disease, injury, mental or nervous disease, or infirmity, or ever had any disease or weakness of the head, throat, heart, lungs, stomach, kidneys, bladder, or any disease or infirmity whatever," answered "No," it was held not untrue, although a year before he had been treated by a physician while insensible from the influence of chloroform, presumably taken with suicidal intent.[179] A failure of the applicant to state, in reply to a question as to when and for what diseases he has consulted a physician, that he had taken the Keeley cure for alcoholism is not a misrepresentation, as drunkenness is not a disease within the meaning of this inquiry.[180]

A statement in the application that the applicant since childhood had not had the disease or disorder of spitting of blood is material, and invalidates the policy where it appears that within a year prior to the application he had a hemorrhage, in regard to which he consulted a physician.[181] So, where the applicant stated that he had never had kidney disease and had not been attended by a physician within two years, and proofs of death were made by a physician, wherein it was stated that he had attended the assured for acute kidney disease and that he had died of Bright's disease, and the proofs were by the contract made evidence against the insured, it was held that the falsity of the answers was established, and that there could be no recovery.[182] So, where the applicant stated that he had been in good health, with the exception of having had yellow fever seven or eight years before, and that he had no physician and had

Howle, 62 Ohio St. 204, 56 N. E. 908 (1900).

[177] Billings v. Metropolitan L. Ins. Co., 70 Vt. 477, 41 Atl. 516 (1898).

[178] Barnes v. Fidelity, etc., Ass'n, 191 Pa. St. 618, 45 L. R. A. 264, 43 Atl. 341 (1899).

[179] Mutual, etc., Ass'n v. Farmer, 65 Ark. 581, 47 S. W. 850 (1898).

[180] Supreme Lodge v. Taylor (Ala.), 24 So. 247 (1898).

[181] Smith v. Northwestern, etc., Ins. Co., 196 Pa. St. 314, 46 Atl. 426 (1900).

[182] Trudden v. Metropolitan L. Ins. Co., 64 N. Y. Supp. 183, 50 App. Div. (N. Y.) 473 (1900).

never been an inmate of any infirmary or hospital, and that he had never had any illness or ailment of any kind, it was held that there could be no recovery where it appeared that prior to the application the applicant was subject to fits, that he had been an inmate of two different hospitals, and had suffered from a severe gunshot wound.[183] So, where the applicant stated that he had never had any serious illness, and it appeared that two months before he made the application he had a severe attack of typhoid fever, the policy was held invalid, although there was opinion evidence to the effect that for "life insurance purposes typhoid fever is not a dangerous disease."[184]

It is difficult to give any precise definition of the word "health." As said in New York: "It is a relative term. It refers to the condition of the body. Thus, it is frequently characterized as perfect, as good, as indifferent, and as bad. The epithet 'good' is comparative. It does not require absolute perfection. When, therefore, one is described as being in good health, that does not necessarily or ordinarily mean that he is absolutely free from all and every ill that flesh is heir to. If the phrase should be so interpreted as to require entire exemption from physical ills, the number to whom it would be strictly applicable would be very inconsiderable. In applying terms somewhat indefinite, reference should be had to the business to which they relate. This rule is very necessary when construing a language which like ours is defective in precision. The most important question on applications for life insurance is whether the proponent is exempt from any dangerous disease, one which frequently terminates fatally. It is not usually deemed an objection that one has some slight physical disturbance of which in all human probability he will soon be relieved, although it might possibly lead to a fatal disease. A slight difficulty, such as the sting of a bee, a boil, or a common cold, has sometimes induced complaints which have shortened human life; but this result is so infrequent and improbable that the mere possibility is disregarded in the business of life insurance."[185]

A person may be in good health although he has a touch of dyspepsia.[186] A disorder or congestion of the liver is not necessarily a

[183] Petitpain v. Mutual Ass'n, 52 La. Ann. 503, 27 So. 113 (1900).

[184] Meyers v. Woodmen, etc., 193 Pa. St. 470, 44 Atl. 563 (1899).

[185] Peacock v. New York L. Ins. Co., 20 N. Y. 293 (1859).

[186] Morrison v. Wisconsin, etc., Ins. Co., 59 Wis. 162 (1884).

disease of the liver.[187] Questions of this character should be left for the jury to determine.[188]

A policy is invalid where it appears that it was issued while the insured was dangerously ill from appendicitis, and the premium was paid by his private secretary, who intentionally concealed the fact of such illness from the officers of the company and stated that the insured was away and had left funds with which to pay the premium.[189]

§ **376. Bodily injuries.**—Where the applicant stated: "I have never been physically injured," the court said: "The reasonable interpretation of the clause is that the decedent was at the time free from serious physical injury, and that any injuries he may have suffered from in the course of his previous life had disappeared and left no trace behind that would render him an unfit subject for accident insurance; that he was, as to such accidents and their results, free from bodily ailments."[190]

Where the applicant falsely stated that there was nothing in his physical condition tending to shorten life which was not in the application, while as a matter of fact his shoulder was in a serious condition as a result of a gunshot wound and an operation, which had not been disclosed, the company was held not estopped from relying upon this false statement by the fact that the applicant called the agent's attention to the arm and showed his use thereof.[191]

Where the applicant was asked, "Have you ever had any difficulty with your head or brain?" and answered, "No," it was held that the question called for a functional or organic derangement, and did not require the disclosure of the fact that he had been subject to periodic headaches.[192]

§ **377. Medical attendance.**—A false statement with reference to having consulted a medical attendant invalidates the policy.[193] If

[187] Cushman v. United States L. Ins. Co., 70 N. Y. 72 (1877).

[188] Mutual, etc., Ins. Co. v. Daviess, 87 Ky. 541 (1888).

[189] Equitable L. Assur. Soc. v. McElroy, 83 Fed. 631, 28 C. C. A. 365 (1897).

[190] Standard, etc., Ins. Co. v. Martin, 133 Ind. 376, 33 N. E. 105 (1893).

[191] National Fraternity v. Karnes (Tex. Civ. App.), 60 S. W. 576 (1901).

[192] Higbie v. Guardian, etc., Ins. Co., 53 N. Y. 603 (1873).

[193] Phillips v. New York, etc., Ins. Co., 9 N. Y. Supp. 836 (1890).

the insured has been attended by a physician within the prescribed time it is his duty to state the fact to the company, as it is entitled to know for what cause he had medical advice, and the name and address of the physician consulted in order that it may make further inquiries from him with reference to the physical condition of the applicant.[194] A statement with reference to having consulted a physician is material to the risk within the meaning of a statute which provides that the falsity of a statement in the application for life insurance shall be no defense to an action on the policy unless it is material to the risk.[195]

The question refers to a consultation about some substantial injury or ailment, and not concerning a slight and temporary indisposition.[196] Thus, consulting a physician for a cold is not a breach of the condition that the insured has not been under the care of a physician for two years.[197] So, calling at a physician's office for medicine to relieve a temporary indisposition, or calling at the house of a physician for the same purpose, is not a breach of a warranty that the applicant has not consulted a physician since childhood except for the measles.[198] "If the insured went to a physician for the purpose of getting his aid, advice or assistance as a physician for a difficulty under which he was then suffering, or supposed himself to be suffering, and the physician, hearing what the insured had to say, as a physician, for the purpose of relief or aid or cure or assistance, gave to the insured medicine, then it might be said that the said physician prescribed for him."[199]

An applicant was asked, "How long since you have consulted a physician?" and answered, "Five years." It appeared that he had consulted a physician the previous year, and it was held insufficient to establish the falsity of the answer, as the question was ambiguous.[200]

§ 378. Family relationship.—The insurance company is entitled to have correct answers given to questions with reference to the family

[194] United Brethren, etc., Soc. v. O'Hara, 120 Pa. St. 256, 13 Atl. 932 (1888).

[195] Fidelity, etc., Ass'n v. McDaniel, 25 Ind. App. 608, 57 N. E. 645 (1900).

[196] Hubbard v. Mutual, etc., Ass'n, 100 Fed. 719, 40 C. C. A. 665 (1900).

[197] Metropolitan L. Ins. Co. v. Larson, 85 Ill. App. 143 (1899).

[198] Billings v. Metropolitan L. Ins. Co., 70 Vt. 477, 41 Atl. 516 (1898).

[199] Cobb v. Covenant, etc., Ass'n, 153 Mass. 176 (1891).

[200] Stewart v. Equitable, etc., Ass'n, 110 Iowa 528, 81 N. W. 782 (1899).

relationships of the applicant, and a false statement with reference thereto will invalidate the policy. Thus, a false statement that the applicant is a widower,[201] or that he is a single man,[202] will render the policy void, although a statement that the person named as beneficiary is a cousin of the applicant is immaterial.[203] The applicant is often asked as to the cause of the death of deceased members of his family, and as the cause of death is often a mere matter of opinion, about which even physicians may differ, an untrue statement with reference to the same will not invalidate the policy when made in good faith.[204] So, a statement by the applicant to a medical examiner of the insurance company that he had no dead brother was construed to be a representation which would not invalidate the policy in the absence of fraud or intentional misstatement, although the application signed by him stated that the answers were warranted to be true.[205]

§ 379. **Other insurance.**—A false answer in response to a question as to other insurance will invalidate a policy.[206] The only question which is liable to arise in reference to other insurance in connection with life insurance contracts is whether it includes certificates in mutual benefit associations. On this the authorities are conflicting. In some states it has been held that such associations are insurance companies, and their contracts are properly termed policies, and hence constitute other insurance.[207] In others such associations are not treated as insurance companies, but belong to a recognized class of organizations known as benevolent associations.[208]

[201] United Brethren, etc., Soc. v. White, 100 Pa. St. 12 (1882).

[202] Jeffries v. Life Ins. Co., 22 Wall. (U. S.) 47 (1874).

[203] Britton v. Supreme Council, 46 N. J. Eq. 102 (1889).

[204] Knights of Honor v. Dickson, 102 Tenn. 255, 52 S. W. 862 (1899).

[205] Globe, etc., Ins. Co. v. Wagner, 188 Ill. 133, 58 N. E. 970 (1900). See § 108a, *supra*.

[206] Clapp v. Massachusetts Ben. Ass'n, 146 Mass. 519 (1888); Bruce v. Connecticut, etc., Ins. Co., 74 Minn. 310 (1898).

[207] State v. Nichols, 78 Iowa 747, 41 N. W. 4 (1888); Co-operative, etc., Ins. Order v. Lewis, 12 Lea (Tenn.) 136 (1883); Presbyterian, etc., Assur. Fund v. Allen, 106 Ind. 593, 7 N. E. 317 (1886); Sherman v. Com., 82 Ky. 102 (1884); Commonwealth v. Wetherbee, 105 Mass. 149 (1870).

[208] Masonic Aid Ass'n v. Jones, 154 Pa. St. 99, 26 Atl. 253 (1893); Commonwealth v. Equitable Ben. Ass'n, 137 Pa. St. 412, 18 Atl. 1112 (1890); Lithgow v. Supreme Tent, etc., 165 Pa. St. 292, 30 Atl. 830 (1895); Theobald v. Supreme Lodge, etc., 59 Mo. App. 87 (1894).

The circuit court of appeals, in considering this question, said:[209] "It will be conceded that these associations, which are primarily for social and charitable purposes and for securing efficient mutual aid among their members, are not usually described as insurance companies. That the certificate which they issue to a member, insuring upon certain conditions the payment of a sum certain to a member's representatives on his death, has much resemblance in form, purpose and effect to an insurance policy is true; and if we were called upon to give the application a wide and liberal construction in favor of the insurance company, we might properly hold that the language embraces in its scope every association or individual contracting to pay money to one's representatives in the event of his death. Such construction might be warranted by the probable purpose of the question to enable the company to judge how great a motive his life insurance would furnish the applicant for self-destruction or fraudulent simulation of death. But we are considering a contract and application drawn with great nicety by an insurance company and framed with the sole purpose of eliciting from the insured full information of all circumstances which the company's long experience has led it to believe to be valuable in calculating the risk. We can not presume the company to have been ignorant of the fact that large numbers of persons have taken out life insurance in mutual benefit associations which are not ordinarily described as insurance companies, and that doubt has often arisen whether the contracts they issue are properly or technically described as life insurance at all.[210] Having in view the well established rule that insurance contracts are to be construed against those who frame them and that any doubt or ambiguity in them is to be resolved in favor of the insured, we conclude that a certificate in a mutual benefit and social society was not within the description 'policy of life insurance in any other company.'"

§ 380. **Rejection of former application.**—Insurance companies often ask whether the applicant has previously applied for insurance in any other company and been rejected. A party signed an application for life insurance, and after the medical examination was substantially completed refused to comply with certain physical tests which were required. The company thereupon rejected his applica-

[209] Penn, etc., Ins. Co. v. Mechanics' Sav., etc., Co., 72 Fed. 413, 19 C. C. A. 286 (1896).

[210] Continental L. Ins. Co. v. Chamberlain, 132 U. S. 304 (1889).

tion and notified him of the fact by mail. Subsequently he applied to another company for insurance, and, in answer to a question, stated that he had not formally made a proposal or application to any company, agent, or association, on which a policy had not been issued. It was held that this answer was substantially and technically false and avoided the policy.[211]

A person applied to an agent of an insurance company for insurance upon his life, filled up and signed an application which the agent was authorized to reduce to writing. The agent and the applicant then went to the office of the medical examiner, but, not finding him in, no examination was made. The agent subsequently went to the medical examiner alone with the application, which had been delivered to him, and was advised by the examiner that, having attended the applicant professionally, he was aware that the applicant was not insurable, and that it was useless to examine him. The application, which had been reduced to writing by the agent, was thereupon destroyed. It was held that these facts established conclusively that an application for insurance had been made within the purview of a question propounded by another company to the same person subsequently applying for insurance, as to whether an application for insurance had ever been made by him to any other company.[212]

The organization known as the Royal Arcanum is an "association" within the meaning of the word as used in the question, "Has any company or association ever declined or postponed granting or reviving insurance on your life, either for any particular amount or in any particular form?"[213]

Where the applicant was asked the question, "Has an examining physician for a life insurance company or order declined to recommend your application?" and answered, "No," it was held that the false statement invalidated the policy.[214]

[211] Security, etc., Ins. Co. v. Webb, 106 Fed. 808, 45 C. C. A. 648 (1901).

[212] Edington v. Ætna L. Ins. Co., 77 N. Y. 564 (1879), 100 N. Y. 536, 3 N. E. 315 (1885).

[213] Bruce v. Connecticut, etc., Ins. Co., 74 Minn. 310, 77 N. W. 210 (1899), and cases therein cited.

[214] Finch v. Modern Woodmen, 113 Mich. 646, 71 N. W. 1104 (1897).

CHAPTER XV.

ACCIDENT INSURANCE.

§ **390. In general.**—The lack of uniformity in accident insurance policies and the great number of conditions and limitations with which they are at present incumbered renders it impracticable to arrange the matter of this chapter under the provisions of a model form.

§ **391. Definition of accident.**—"Accidental" means happening by chance; unexpectedly taking place; not according to the usual course of things, or not as expected.[1] It includes any unusual or unexpected result which attends the performance of a usual act.[2] Thus, within

[1] Lovelace v. Travelers' Protect. Ass'n, 126 Mo. 104, 28 S. W. 877, 30 L. R. A. 209, Woodruff Ins. Cas. 270 (1894); United States, etc., Ass'n v. Barry, 131 U. S. 100 (1888); Paul v. Travelers' Ins. Co., 112 N. Y. 472, 8 Am. St. 766 (1889), and note; Richards v. Travelers' Ins. Co., 89 Cal. 170 (1891); North American, etc., Ins. Co. v. Burroughs, 69 Pa. St. 43 (1871). A snowstorm is not an "accident": Fenwick v. Schmalz, L. R. 3 C. P. 313 (1868). Injuries received in a fight in which the insured engaged without fault on his part are "accidental": Supreme Council v. Garrigus, 104 Ind. 133, 3 N. E. 818 (1885).

[2] Providence L., etc., Co. v. Martin, 32 Md. 310 (1869); Western, etc., Ass'n v. Smith, 85 Fed. 401, 29 C. C. A. 223 (1898).

the definition of an accident are included the following:—A rupture of a blood vessel while exercising with indian clubs;[3] an unintentional taking of poison;[4] a sprain caused by lifting a heavy weight;[5] an injury resulting from jumping from the platform of a train under circumstances which would justify a person in assuming that no harm would result;[6] suicide while insane;[7] death by hanging at the hands of a mob;[8] injuries from an assault which the insured was not expecting and did nothing to induce;[9] injuries intentionally inflicted by another.[10]

The accident must be the proximate and sole cause of the injury or there can be no recovery.[11]

I. *Construction of Provisions of Policy.*

§ **392. External, violent, or accidental injuries.**—A policy insuring against death or accident caused by "external, violent or accidental means" covers death by stumbling and falling against a locomotive engine;[12] a fall due to a temporary and unexpected physical dis-

[3] McCarthy v. Travelers' Ins. Co., 8 Biss. (U. S.) 362 (1878).

[4] Healey v. Mutual Acc. Ass'n, 133 Ill. 556, 9 L. R. A. 371 (1890); Mutual, etc., Ass'n v. Tuggle, 39 Ill. App. 509 (1890).

[5] Martin v. Travelers' Ins. Co., 1 F. & F. 505 (1859). Policies sometimes exempt the company from liability when the injury is caused by voluntary overexertion. For construction of this provision, see Rustin v. Standard, etc., Ins. Co., 58 Neb. 792, 79 N. W. 712, Woodruff Ins. Cas. 294 (1899); Metropolitan, etc., Ass'n v. Bristol, 69 Ill. App. 492 (1896); Reynolds v. Equitable Acc. Ass'n, 49 Hun (N. Y.) 605 (1888).

[6] United States, etc., Ass'n v. Barry, 131 U. S. 100 (1888). But see Southard v. Railway, etc., Assur. Co., 34 Conn. 574 (1868).

[7] Blackstone v. Standard, etc., Ins. Co., 74 Mich. 592, 3 L. R. A. 486 (1889); Mutual, etc., Ins. Co. v. Daviess, 87 Ky. 541 (1888).

[8] Fidelity, etc., Co. v. Johnson, 72 Miss. 333, 17 So. 2, 30 L. R. A. 206 (1894).

[9] Phelan v. Travelers' Ins. Co., 38 Mo. App. 640 (1890).

[10] See § 400, *infra*.

[11] Freeman v. Mercantile, etc., Ass'n, 156 Mass. 351, Woodruff Ins. Cas. 282, 17 L. R. A. 753 (1892), and note on Proximate Cause of Death within the Meaning of a Life Insurance Policy. See, also, Manufacturers' Acc. Indem. Co. v. Dorgan, 58 Fed. 945, 7 C. C. A. 581, 22 L. R. A. 620 (1893); Western, etc., Ass'n v. South, 85 Fed. 401, 29 C. C. A. 223 (1898); Martin v. Manufacturers', etc., Co., 151 N. Y. 94, 45 N. E. 377 (1896).

[12] Equitable Acc. Ins. Co. v. Osborn, 90 Ala. 201, 9 So. 869, 13 L. R. A. 267 (1890).

order;[13] an accidental strain causing death;[14] a blow struck by another person;[15] death due to excitement and strain caused by attempting to hold and control a frightened and runaway team;[16] death caused by accidental drowning;[17] death caused by drowning while attempting to rescue the crew of a wrecked ship, where it appeared that there was a bruise over the left temple;[18] a rupture caused by jumping from a train;[19] choking to death while attempting to swallow a piece of beefsteak;[20] injury caused by the sting of an insect;[21] hanging at the hands of a mob;[22] death by inhaling gas while working in a well;[23] blood poisoning, caused by an abrasion of the skin of a toe by a new shoe;[24] lockjaw produced by a gunshot accidentally inflicted upon the insured by himself.[25] But a rupture caused by the insured jumping from a train, where he acted for his own convenience, and not under any necessity, was held not within the conditions of an accident policy insuring against injury caused by "violent or external means."[26] So, sunstroke contracted in the course of the ordinary duties of an architect is a disease, and not an accident caused by "external, violent or accidental means."[27] A policy provided that "insurance under this policy shall extend only to physical and bodily

[13] Meyer v. Fidelity, etc., Co., 96 Iowa 378, 65 N. W. 328 (1895).

[14] North American, etc., Ins. Co. v. Burroughs, 69 Pa. St. 43 (1871).

[15] Richards v. Travelers' Ins. Co., 89 Cal. 170, 26 Pac. 762, 23 Am. St. 455 (1891).

[16] McGlinchey v. Fidelity, etc., Co., 80 Me. 251, 14 Atl. 13 (1889).

[17] Manufacturers', etc., Indem. Co. v. Dorgan, 58 Fed. 945, 7 C. C. A. 581 (1893); Mallory v. Travelers' Ins. Co., 47 N. Y. 52, 7 Am. Rep. 410 (1871); Tucker v. Mutual Ben. Life Co., 121 N. Y. 718 (1890); De Van v. Commercial, etc., Ass'n, 92 Hun (N. Y.) 256 (1895), 157 N. Y. 690, 51 N. E. 1090 (1898); Trew v. Railway, etc., Assur. Co., 6 Hurl. & N. 838 (1861); United States, etc., Ass'n v. Hubbell, 56 Ohio St. 516, 47 N. E. 544, 40 L. R. A. 453 (1897).

[18] Tucker v. Mutual Ben. Life Co., 121 N. Y. 718, 24 N. E. 1102 (1888).

[19] Travelers' Ins. Co. v. Murray, 16 Colo. 296, 26 Pac. 774 (1891).

[20] American Acc. Co. v. Reigart, 94 Ky. 547, 23 S. W. 191, 21 L. R. A. 651 (1893).

[21] Omberg v. United States, etc., Ass'n, 19 Ky. L. 462, 40 S. W. 909 (1897).

[22] Fidelity, etc., Co. v. Johnson, 72 Miss. 333, 17 So. 2, 30 L. R. A. 206 (1894).

[23] Pickett v. Pacific, etc., Ins. Co., 144 Pa. St. 79, 22 Atl. 871, 13 L. R. A. 661 (1891); Paul v. Travelers' Ins. Co., 112 N. Y. 472, 20 N. E. 347, 3 L. R. A. 443 (1889).

[24] Western, etc., Ass'n v. Smith, 85 Fed. 401, 29 C. C. A. 223 (1898).

[25] Travelers' Ins. Co. v. Melick, 65 Fed. 178, 12 C. C. A. 544 (1894).

[26] Southard v. Railway, etc., Assur. Co., 34 Conn. 574 (1868).

[27] Dozier v. Fidelity & Cas. Co., 46 Fed. 446 (1891).

injuries resulting in disability or death * * * solely by reason of and through external, violent and accidental means within the terms and conditions of this contract, and which shall, independently of all other causes immediately, wholly, totally and continuously from the date of the accident causing the injury, disable the insured. If any injury causing disability or death entitling the insured to claim benefits under the provisions of this policy be caused or contributed to * * * by any sunstroke or freezing while in the line of his duty as a railroad employe * * * then, in such case, the limit of the association's liability shall be one-fourth of the sum otherwise payable." It was held that under this limitation a sunstroke received while in the line of his employment was covered by the policy.[28]

§ 393. **Risks of travel.**—Policies sometimes insure against accidents "while actually traveling in a public conveyance," and while complying with the rules and regulations of the carrier. Such a policy covers an accident which occurs while the insured is getting on or off a train, either at an intermediate station, where he left the car temporarily, or at his destination.[29] A party accepting a policy which plainly limits the risk to that of a common carrier's public conveyances can not recover for injuries received while caring for and selling horses which he was taking to market, although the agent of the company instructed him that the policy would cover such risks.[30] But the company is presumed to issue its policy with a knowledge of the ordinary customs of the business in which the insured is engaged. Hence, a cattle dealer who receives a policy which permits him to care for his cattle in transit on trains may show that at the time of the injury he was engaged in doing what was customary among cattle dealers.[31] A party who is insured against "accident while traveling by public or private conveyance, provided for the transportation of passengers," can recover for an injury sustained while going on foot from a steamboat landing to the railway station for the purpose of continuing his journey.[32] But a person who had left the landing place of a steamer and was injured while

[28] Railway, etc., Ass'n v. Johnson, 22 Ky. L. 759, 58 S. W. 694, 52 L. R. A. 401 (1900).

[29] Tooley v. Railway, etc., Assur. Co., 3 Biss. (U. S.) 399 (1873).

[30] Fidelity, etc., Co. v. Teter, 136 Ind. 672, 36 N. E. 283 (1894).

[31] Pacific, etc., Ins. Co. v. Snowden, 58 Fed. 342, 7 C. C. A. 264 (1893).

[32] Northrup v. Railway Pass., etc., Co., 43 N. Y. 516, 3 Am. Rep. 724 (1871).

walking home, a distance of about eight miles, was not traveling by a "public or private conveyance at the time of the injury."[33]

§ 394. **Inhaling gas—Poison.**—Under a policy which contains a provision that the liability of the company shall not extend to any death or disability which may have been caused "by the taking of poisonous substances, or the inhaling of gas, or by any surgical operation or medical treatment," the company is not liable for death caused by a voluntary and intelligent act on the part of the insured, as distinguished from one which was unconscious and in that sense involuntary. An insurance company was therefore held liable under such a policy where the insured was asphyxiated by illuminating gas which he unconsciously, involuntarily and accidentally inhaled while asleep in his room at a hotel.[34]

Death caused by the poisonous sting of an insect is not within a clause exempting the company from liability for injuries caused by "poison in any form," or "by contact with poisonous substances."[35] Death resulting from the shock caused by swallowing aqua ammonia results from taking poison.[36] Under a policy insuring against "the effects of injury to the body caused by external, violent or accidental means," but excepting liability for death caused by poison, the insurer is liable when death is caused by poison accidentally taken by the insured.[37]

[33] Ripley v. Insurance Co., 16 Wall. (U. S.) 336 (1872).

[34] Paul v. Travelers' Ins. Co., 112 N. Y. 472, 20 N. E. 347 (1889); Bacon v. United States, etc., Acc. Ass'n, 123 N. Y. 304, 25 N. E. 399 (1890); Menneiley v. Employers', etc., Assur. Corp., 148 N. Y. 596, 43 N. E. 54 (1896); Pickett v. Pacific Ins. Co., 144 Pa. St. 79, 22 Atl. 871, Woodruff Ins. Cas. 290 (1890); Fidelity, etc., Co. v. Waterman, 59 Ill. App. 297 (1895); affirmed 161 Ill. 632, 44 N. E. 283 (1896). See, also, Fidelity, etc., Co. v. Lowenstein, 97 Fed. 17, 38 C. C. A. 29 (1899). *Contra*, on the general proposition, see McGlother v. Provident, etc., Acc. Co., 89 Fed. 685, 32 C. C. A. 318 (1898); Early v. Standard, etc., Ins. Co., 113 Mich. 58, 71 N. W. 500 (1897).

[35] Omberg v. United States, etc., Ass'n, 19 Ky. L. 462, 40 S. W. 909 (1897).

[36] Early v. Standard, etc., Co., 113 Mich. 58, 71 N. W. 500 (1897).

[37] Early v. Standard, etc., Ins. Co., 113 Mich. 58, 71 N. W. 500 (1897); Travelers' Ins. Co. v. Dunlap, 160 Ill. 642, 43 N. E. 765, Woodruff Ins. Cas. 287 (1896), and cases cited; Metropolitan Acc. Ass'n v. Froiland, 161 Ill. 30, 43 N. E. 766 (1896). See Pollock v. United States, etc., Ass'n, 102 Pa. St. 230 (1883).

Where the policy contained a statement: "I agree that this instrument shall not be held to extend * * * to poison *in any way* taken, administered, absorbed, or inhaled," it was held that the words "in any way" related to the mode or manner in which the poison was taken, and not to the motive of the insured in taking it.[38]

In a recent case in Wisconsin,[39] the policy in suit excepted "injuries, fatal or otherwise, resulting wholly or in part from poison, or anything accidentally or otherwise taken, administered, absorbed, or inhaled." The insured died from blood poisoning resulting from the treatment of a wound caused by extracting a tooth. It was said that there was no reason for extending the rule that death caused by inhaling gas accidentally or otherwise only covers cases of voluntary, conscious inhalation. "Certainly no good reason can be given for extending it to cases of accidental taking or absorption of poisonous substances into the system through the voluntary use for remedial purposes of some other substance. In the instances cited, the word 'inhaled' and the word 'taken,' in view of the other language used in the contract, were easily construed to contemplate voluntary, conscious action, not in the sense that the victim should know the precise nature of the substance that he was taking or inhaling, and its effect on his system, but that the taking should be by his own act or permission. Here, the cotton was placed in the mouth of the deceased

[38] Metropolitan Acc. Ass'n v. Froiland, 161 Ill. 30, 43 N. E. 766 (1896). The court said: "Very nearly this precise language was so construed in Connecticut, etc., Ins. Co. v. Akens, 150 U. S. 468 (1893). It was there held that in the phrase 'self-destruction in any form' the words 'in any form' clearly related to the manner of killing, and that the clause was by no means synonymous in meaning with such phrases as 'die by suicide, sane or insane,' or by 'suicide, felonious or otherwise, sane or insane.' In accordance with the ruling in Travelers' Ins. Co. v. Dunlap, 160 Ill. 642, 43 N. E. 765 (1896), and Healey v. Mutual Acc. Ass'n, 133 Ill. 556, 25 N. E. 52 (1890), we must hold in the case at bar that the death of the member, Froiland, having been caused by accident, is not excluded from the risks covered by the contract of insurance sued on by reason of the exception above mentioned. Insurance contracts are to be liberally construed so as not to defeat the indemnity which, in making the contract, was the object to be secured, unless plainly necessary from the language of the contract."

[39] Kasten v. Interstate Cas. Co., 99 Wis. 73, 74 N. W. 534, 40 L. R. A. 651 (1898); Early v. Standard, etc., Ins. Co., 113 Mich. 58, 71 N. W. 500 (1897); Westmoreland v. Preferred, etc., Ins. Co., 75 Fed. 244 (1896) [when the insured died from the effects of chloroform].

by his own permission. True, the fact that it contained germs which propagated and evolved the poison which was absorbed into the blood with fatal effects was unknown and accidental, but that was within the express terms of the exception under consideration."

§ 395. **Occupation or employment.**—The ordinary accident policy insures the party against accident while he is occupied or employed as described in the contract. All occupations are not subject to the same risks, and some are so hazardous as to render it impossible for the parties engaged in them to procure accident insurance. The insurance companies classify the various occupations and arrange their premium rates in accordance with the hazard involved. Where the contract provides that if the insured is injured in any occupation rated by the company as more hazardous than that given by the insured as his occupation, the insurance shall only be what the premium paid would purchase at the rate fixed by the tables for the increased hazard, the jury must determine whether there has been any increase in the risk.[40]

Where the insured gave his occupation as that of a blacksmith employed by a railroad company, and it appeared that he also acted as a switchman and car-coupler, which occupation was classed as a more hazardous one, he was allowed to recover the amount the premium paid would have secured in the more hazardous occupation.[41]

A mere occasional act not strictly within the scope of the stated occupation is not engaging in another occupation. Such provisions refer to classes of occupations and not to particular acts. Thus, one who is insured as a "grocer with desk and counter duties" may hunt for pleasure without being held to have engaged in the occupation of a hunter.[42] So, a person insured as a mining expert does not become an engineer or fireman by casually riding on an engine.[43] A farmer may drive piles in the construction of a private bridge without engaging in the occupation of a piledriver.[44] A banker does

[40] Standard, etc., Ins. Co. v. Martin, 133 Ind. 376, 33 N. E. 105 (1893). See § 373, *supra*.

[41] Standard L., etc., Ins. Co. v. Taylor, 12 Tex. Civ. App. 386, 34 S. W. 781 (1896).

[42] Union, etc., Ass'n v. Frohard, 134 Ill. 228, 25 N. E. 642, 10 L. R. A. 383 (1890); Star Accident Co. v. Sibley, 57 Ill. App. 315 (1894); Kentucky, etc., Ins. Co. v. Franklin (Ky.), 43 S. W. 709 (1897).

[43] Berliner v. Travelers' Ins. Co., 121 Cal. 458, 53 Pac. 918, 41 L. R. A. 467 (1898).

[44] National, etc., Society v. Taylor, 42 Ill. App. 97 (1892).

not change his employment to that of a sawyer by operating a saw to cut some pieces of lumber while he is in a sawmill for the purpose of getting some boards to make a table to use in his bank.[45]

But it seems that operating a buzz-saw for his own amusement is not within the permissible pleasures of one who states his occupation to be that of "retired gentleman."[46]

Where the insured is engaged in a designated employment, and the policy provides that the company shall not be liable for accidents while engaged in a more hazardous employment, it is for the jury to determine whether a certain employment is more hazardous than another.[47]

§ 396. **External signs.**—A provision to the effect that there shall be no liability for injuries which produce no external and visible signs does not apply to injuries which result in death.[48] Under such a provision the insured was allowed to recover for injury caused by a strain which produced no external result until some time after the accident.[49] A nosebleed is an external and visible sign of injury.[50] Where artificial respiration practiced upon a dead body brought forth illuminating gas, it was treated as an external or visible mark of an accident.[51] So, where water ran from the mouth of a dead body, which was taken from a river, it was held that there were external and visible signs of drowning.[52]

[45] Hess v. Preferred, etc., Ass'n, 112 Mich. 196, 70 N. W. 460, 40 L. R. A. 444 (1897). A teacher who, while out of employment, causes two dwelling houses to be erected does not become a "builder:" Stone v. United States Cas. Co., 34 N. J. L. 371 (1871). See, also, Grattan v. Metropolitan, etc., Ins. Co., 80 N. Y. 281 (1880); Dwight v. Germania L. Ins. Co., 103 N. Y. 341 (1886); North American, etc., Ins. Co. v. Burroughs, 69 Pa. St. 43 (1871).

[46] Knapp v. Preferred, etc., Ass'n, 53 Hun (N. Y.) 84 (1889).

[47] Eggenberger v. Guarantee, etc., Ass'n, 41 Fed. 172 (1890). For definition of "employment," see Stone v. United States Cas. Co., 34 N. J. L. 371 (1871).

[48] McGlinchey v. Fidelity, etc., Co., 80 Me. 251, 14 Atl. 13, Woodruff Ins. Cas. 277 (1888); Eggenberger v. Guarantee, etc., Ass'n, 41 Fed. 172 (1889).

[49] Pennington v. Pacific, etc., Ins. Co., 85 Iowa 468, 52 N. W. 482 (1892).

[50] Whitehouse v. Travelers' Ins. Co., Fed. Cas. No. 175,666, 7 Ins. L. J. 23 (1877).

[51] Menneiley v. Employers', etc., Assur. Corp., 148 N. Y. 596, 43 N. E. 54, 31 L. R. A. 686 (1896).

[52] Wehle v. United States, etc., Ass'n, 63 N. Y. St. 464, 31 N. Y. Supp. 865 (1895).

II. *Excepted Risks.*

§ 397. **Effect of negligence.**—Unless excepted by the terms of the policy, the insured is entitled to recover where the accident was caused by his own negligence.[53] But policies ordinarily provide that the company shall not be liable unless the insured exercises due care for his personal protection. Under such a provision he is bound to exercise that degree of care which an ordinarily prudent man would use under the same circumstances.[54]

The insured was not allowed to recover where the policy contained such a provision, and it appeared that he was thrown from the platform of a passenger coach, where he was standing in violation of a known rule of the carrier.[55]

§ 398. **Voluntary exposure to unnecessary dangers.**—Accident policies commonly exempt the insurer from liability for death or injury caused by voluntary exposure to unnecessary danger, or hazards, or perilous adventure. This means wanton or grossly imprudent exposure.[56] In an English case it was said:[57] "Two classes of accidents are excluded from the risks insured against; viz.:

"(1) Accidents which arise from exposure by the insured to risk of injury, which risk is obvious at the time he exposes himself to it.

"(2) Accidents which arise from an exposure by the insured to risk of injury where the risk would be obvious to him at the time if he were paying reasonable attention to what he was doing."

The phrase "voluntary exposure to unnecessary danger" means intentional exposure to a danger; as where a person acts so recklessly and carelessly as to show an utter disregard of known danger, or does an act in the face of a risk and danger so obvious that a pru-

[53] Schneider v. Provident L. Ins. Co., 24 Wis. 28, 1 Am. Rep. 157 (1869); Wilson v. Northwestern, etc., Ass'n, 53 Minn. 470, 55 N. W. 626 (1893).

[54] Tuttle v. Travelers' Ins. Co., 134 Mass. 175, 45 Am. Rep. 316 (1883); Duncan v. Preferred, etc., Ass'n, 13 N. Y. Supp. 620 (1891); Kentucky L., etc., Ins. Co. v. Franklin, 19 Ky. L. 1573, 43 S. W. 709 (1897); Stone v. United States Cas. Co., 34 N. J. L. 371 (1871).

[55] Bon v. Railway, etc., Assur. Co., 56 Iowa 664, 10 N. W. 225, 41 Am. Rep. 127 (1881).

[56] Manufacturers', etc., Indem. Co. v. Dorgan, 58 Fed. 945, 7 C. C. A. 581 (1893).

[57] Cornish v. Accident Ins. Co., L. R. 23 Q. B. D. 453 (1889) [insured was killed while attempting to cross a railway track].

dent man, exercising reasonable foresight, would not have done it.[58] It means dangers recognized, but consciously and intentionally assumed.[59] A policy containing such a provision does not relieve the company from liability for injury which resulted from a voluntary exposure to a danger which was contemplated by the contract.[60] A party who goes out in a boat on a dark night to fish, without a knowledge of the existence of snags which are dangerous to his boat, does not expose himself to unnecessary danger within the meaning of such provision.[61] Nor does a person voluntarily expose himself to danger by riding in a bicycle race and overexerting himself;[62] nor by cleaning a gun, without the knowledge that it was defective and loaded;[63] nor by visiting a house of ill fame and getting shot immediately after leaving the place;[64] nor, generally, by doing what a man of ordinary prudence would do under the same circumstances;[65] as by climbing a bank with a loaded gun in his hand, while hunting.[67] But there can be no recovery under such a policy for an accident occasioned by jumping from a moving train after it has passed the station;[68] or by attempting to cross through a freight train standing across the highway;[69] or by attempting to lower himself from a window to avoid police officers who were at the door.[70] A person who, with packages in

[58] De Loy v. Travelers' Ins. Co., 171 Pa. St. 1, 32 Atl. 1108 (1895); Johnson v. London Guar., etc., Co., 115 Mich. 86, 72 N. W. 1115, 40 L. R. A. 440 (1895); Manufacturers', etc., Indem. Co. v. Dorgan, 58 Fed. 945, 7 C. C. A. 581, 22 L. R. A. 620 (1897).

[59] Travelers' Ins. Co. v. Randolph, 78 Fed. 754, 24 C. C. A. 305 (1897); Ashenfelter v. Employers', etc., Assur. Corp., 87 Fed. 682, 31 C. C. A. 193 (1898).

[60] Wilson v. Northwestern, etc., Ass'n, 53 Minn. 470, 55 N. W. 626 (1893).

[61] Collins v. Bankers' Acc. Ins. Co., 96 Iowa 216, 64 N. W. 778 (1895).

[62] Keeffe v. National Acc. Soc., 4 App. Div. (N. Y.) 392 (1896).

[63] Miller v. American, etc., Ins. Co., 92 Tenn. 167, 21 S. W. 39, 20 L. R. A. 765 (1893).

[64] Jones v. United States, etc., Ass'n, 92 Iowa 652, 61 N. W. 485 (1894).

[65] Shevlin v. American, etc., Ass'n, 94 Wis. 180, 68 N. W. 866, 36 L. R. A. 52 (1896).

[67] Cornwell v. Fraternal Acc. Ass'n, 6 N. Dak. 201, 69 N. W. 191, 40 L. R. A. 437 (1896).

[68] Smith v. Preferred, etc., Ass'n, 104 Mich. 634, 62 N. W. 990 (1895).

[69] Bean v. Employers', etc., Assur. Corp., 50 Mo. App. 459 (1892). One who attempted to cross the track between the cars of a freight train, when he saw the men in the places where they would be if the train was about to start, voluntarily exposed himself to unnecessary danger: Willard v. Masonic, etc., Ass'n, 169 Mass. 288, 47 N. E. 1006 (1897).

[70] Shaffer v. Travelers' Ins. Co. (Ill.), 22 N. E. 589 (1889).

his hands, attempts to cross over a trestle which he knows is dangerous, while there are other ways of travel open to him, voluntarily exposes himself to unnecessary danger.[71] But it can not be said, as a matter of law, that a person voluntarily exposes himself to unnecessary danger by crossing a railroad trestle bridge, where there is a plank walk and a fence railing on one side.[72] Whether standing on the platform of a moving train which is going at a rapid speed is a voluntary exposure to a known danger, is a question for the jury.[73] Whether, under all the circumstances, going on a railroad track or bridge is a voluntary exposure to unnecessary danger, is a question of fact which should be submitted to the jury.[74]

Force must be given to the word "unnecessary" as qualifying "danger." An attempt of a traveling man to get on a train which is already in motion is not, as a matter of law, a voluntary exposure to an unnecessary danger.[75] The term "voluntary exposure" does not mean simply that the act of attempting to get on board of a moving train was voluntarily or was consciously or intentionally performed, but also that the insured was conscious of the danger to which he was thus exposing himself, and voluntarily assumed it, or that the danger was so apparent that a man of ordinary intelligence would, under such circumstances, have known it. As was said by the court: "Mere failure to observe ordinary care would not, as in an action for negligence, defeat a recovery on the contract. * * * For one to leap into a turbulent stream, rush into a burning building, or to do any other hazardous thing to save human life, would be a voluntary exposure to danger, but not to unnecessary danger. So, too, many emergencies in the lives of men occur, where the most urgent necessity requires their presence at some particular place, at some particular time, and where to miss a train would involve serious consequences. In such cases the voluntary exposure to danger might not be unnecessary; as, the presence of a physician or surgeon at

[71] Travelers' Ins. Co. v. Jones, 80 Ga. 541, 7 S. E. 83, 12 Am. St. 270 (1888).

[72] Follis v. United States, etc., Ass'n, 94 Iowa 435, 62 N. W. 807, 27 L. R. A. 78 (1895).

[73] Travelers' Ins. Co. v. Randolph, 78 Fed. 754, 24 C. C. A. 305 (1897). See Standard, etc., Ins. Co. v. Thornton, 100 Fed. 582, 40 C. C. A. 564 (1900).

[74] Keene v. New England, etc., Ass'n, 161 Mass. 149, 36 N. E. 891 (1894). See, also, Tuttle v. Travelers' Ins. Co., 134 Mass. 175, 45 Am. Rep. 316 (1883); Freeman v. Travelers' Ins. Co., 144 Mass. 572, 12 N. E. 372 (1887); Travelers', etc., Acc. Ass'n v. Stone, 50 Ill. App. 222 (1893).

[75] Fidelity, etc., Co. v. Sittig, 181 Ill. 111, 48 L. R. A. 359 (1900).

some critical period in the illness or injury of a human being might be necessary to save human life, and it might be necessary for him to expose himself to danger to reach his patient, or in some other respect to perform his professional duty. The necessity implied in the provision of the policy does not mean only that which is unavoidable and inevitable, but also any object or purpose which men of moral responsibility and prudence would regard as of such serious importance in the performance of duty as to demand or justify the incurring of risk or danger to accomplish it." A complaint alleging that the insured at the time of his death was seining in a river which was very swift and full of holes, and that the insured, while so engaged, fell into one of said holes, and, being unable to swim, was drowned, is good as against a demurrer.[76] Where the insured, while asleep and unconscious, walked off the platform of a car and was killed, it was held not a case of "voluntary exposure, design or self-inflicted injuries."[77]

§ 399. **Bodily infirmity or disease.**—These words, as used in an accident policy to exempt the insurer from liability for injuries resulting from bodily infirmity or disease, mean practically the same thing. Where the policy insured against accidental injury or death through external, violent or accidental means, and provided that it should not cover "injuries, fatal or otherwise, * * * resulting directly or indirectly from intoxicants * * * or any *disease or bodily infirmity*," it appeared that the defendant was subject to fits when he was insured, and it was claimed that his death was due to disease or bodily infirmity. In stating the meaning of these words, the court said:[78] "When speaking of infirmity we generally mean a state or quality of being infirm, physically or otherwise, debility or weakness; and by the use of the word 'disease' we desire to convey the impression of the morbid, resulting from some functional disturbance or failure of physical functions which tends to undermine the constitution. We do not, as a general rule, apply either term to a slight and temporary disorder, or to the imperfect working of some function, which is over in a short period of time, and which, when recovered from, leaves the body in its normal condition. In using either of the words we do not, as a rule, refer to a slight and

[76] Conboy v. Railway, etc., Ass'n (Ind. App.), 43 N. E. 1017 (1896).

[77] Scheiderer v. Travelers' Ins. Co., 58 Wis. 13 (1883).

[78] Meyer v. Fidelity, etc., Co., 96 Iowa 378, 65 N. W. 328 (1895).

mere temporary disturbance or enfeeblement. If this is true of our ordinary speaking and writing it is clear that the words should be given no broader meaning when we find them used by an insurance company in a clause of its policy which it relies upon to defeat a recovery thereon."

In a case in the circuit court of appeals the words were given the same meaning. "In a broad, generic sense," said Taft, J.,[79] "any temporary trouble by reason of which a man loses consciousness is a disease. It is a condition of the body not normal, and produced by the imperfect working of some function, but as the imperfect working is not permanent and the body returns at once, or in a short period of time, to its normal condition, it does not rise to the dignity of a disease. A fainting spell produced by indigestion or lack of proper food for a number of hours, or for any cause which would not indicate disease in the body, but would show mere temporary disturbance or enfeeblement, would not come within the meaning of the words 'disease or bodily infirmity,' as used in this policy."

Sunstroke is a disease, and not an accident.[80]

Death caused by a malignant pustule resulting from contact of the body with putrid animal matter is death by disease, and not accident.[81]

§ 400. Injuries intentionally inflicted by others.—A policy which insures against accidents covers an injury intentionally inflicted upon the insured by a third person, unless such risk is expressly excepted.[82] "While our preconceived notion of the term 'accident' would hardly lead us to speak of the intentional killing of a person as accidental

[79] Manufacturers', etc., Indem. Co. v. Dorgan, 58 Fed. 945, 7 C. C. A. 581 (1893). See, also, Pudritzky v. Supreme Lodge, 76 Mich. 428, 43 N. W. 373 (1889); Mutual, etc., Ins. Co. v. Daviess, 87 Ky. 541, 9 S. W. 812 (1888).

[80] Dozier v. Fidelity, etc., Co., 46 Fed. 446 (1891); Sinclair v. Maritime, etc., Co., 3 El. & El. 478 (1861).

[81] Bacon v. United States, etc., Acc. Ass'n, 123 N. Y. 304, 9 L. R. A. 617 (1890). As to disease caused by accident, see Freeman v. Mercantile & Acc. Ass'n, 156 Mass. 351, 17 L. R. A. 753 (1892).

[82] Travelers' Ins. Co. v. McConkey, 127 U. S. 661 (1888); Supreme Council v. Garrigus, 104 Ind. 133, 54 Am. Rep. 298 (1885); Hutchcraft v. Travelers' Ins. Co., 87 Ky. 300 (1888); Fidelity, etc., Co. v. Johnson, 72 Miss. 333, 30 L. R. A. 206 (1895), annotated; Lovelace v. Travelers' Prot. Ass'n, 126 Mo. 104, 47 Am. St. 638, 30 L. R. A. 209 (1894); Collins v. Fidelity, etc., Co., 63 Mo. App. 253 (1895); American Acc. Co. v. Carson, 99 Ky. 441, 36 S. W. 169, 34 L. R. A. 301 (1895).

killing, yet no doubt can now remain, in view of the precedents established by all the courts, that the word 'intentional' refers alone to the person inflicting the injury, and if, as to the person injured, the injury was unforeseen, unexpected, not brought about through his agency designedly, or was without his foresight, or was a casualty or mishap not intended to befall him, then the occurrence was accidental and the injury one inflicted by accidental means, within the meaning of such policies."[83] It is customary, however, to insert a provision exempting the company from liability for injuries intentionally inflicted upon the insured by others. The exemption is limited to such injuries as are intentional; hence the insurer is liable where the injury was inflicted by an insane person who was incapable of forming an intent.[84] So, the insurer is liable for injuries caused by a blow struck by a person who did not intend to kill the insured.[85] Where the insured was shot by an officer, who had no intention of killing him, it was held that it could not be said, as a matter of law, that the insured lost his life through the design of another.[86]

Where the policy provided that there could be no recovery for injuries caused by fighting, it was held that there could be no recovery, although the insured was not the aggressor.[87] There is no liability where the insured was intentionally shot and killed by another person;[88] as, where the insured was waylaid and shot by robbers;[89] al-

[83] American Acc. Co. v. Carson, 99 Ky. 441, 34 L. R. A. 301, 36 S. W. 169 (1895). See Button v. American, etc., Acc. Ass'n, 92 Wis. 83, 53 Am. St. 900 (1896).

[84] Corley v. Travelers', etc., Ass'n, 105 Fed. 854, 46 C. C. A. 278 (1900); Berger v. Pacific, etc., Ins. Co., 88 Fed. 241 (1898).

[85] Richards v. Travelers' Ins. Co., 89 Cal. 170, 26 Pac. 762, 23 Am. St. 455 (1891).

[86] Utter v. Travelers' Ins. Co., 65 Mich. 545, 32 N. W. 812, 8 Am. St. 913 (1887).

[87] United States, etc., Ass'n v. Millard, 43 Ill. App. 148 (1892). It is immaterial whether the person by whom the insured was killed was sane or insane, if the insured voluntarily engaged in the fight: Gresham v. Equitable Acc. Ins. Co., 87 Ga. 497, 13 S. E. 752, 13 L. R. A. 838 (1891). See Accident Ins. Co. v. Bennett, 90 Tenn. 256, 16 S. W. 723 (1891).

[88] Jones v. United States, etc., Acc. Ass'n, 92 Iowa 652, 61 N. W. 485 (1894); Fischer v. Travelers' Ins. Co., 77 Cal. 246, 19 Pac. 425, 1 L. R. A. 572 (1888); Travelers' Ins. Co. v. McCarthy, 15 Colo. 351, 25 Pac. 713, 11 L. R. A. 297 (1890).

[89] Railway, etc., Acc. Ass'n v. Drummond, 56 Neb. 235, 76 N. W. 562 (1897); Hutchcraft v. Travelers' Ins. Co., 87 Ky. 300, 8 S. W. 570, 12 Am. St. 484 (1888). A recovery was denied because, while the killing was accidental within the meaning of these words, "external, violent and accidental," as used on the

though, in the absence of such a limiting clause, death by such means would be considered an accident.[90] Where the policy provided that "$4,000 shall be paid in case of death by accident," and that in case of death "by natural causes," the insured should be entitled to $100, the beneficiary was allowed to recover for injuries received by the insured in a fight in which he voluntarily engaged.[91]

Under this exception the insurer is not liable where the insured is murdered.[92] The insurer is not liable where the insured is killed for the purpose of getting the insurance money, under a policy which provides that "this insurance does not cover * * * death resulting wholly or partly, directly or indirectly, from * * * intentional injuries inflicted by the insured or any other person," and which further provides that this clause does not exclude claims for personal injuries received by the insured while defending herself or family, or her property, from assaults of burglars, robbers, thieves or pickpockets.[93] So, there is no liability where the injuries are inflicted upon an officer by a person who is resisting arrest, although such injuries are within the meaning of the words, "external, violent and accidental means."[94] In such cases the general liability is limited by the express provision.

§ 401. **Injuries received while engaged in violation of law.**—Accident insurance companies commonly limit their liability by a provision to the effect that no claim shall be made when an injury or death occurs while the insured is engaged in, or in consequence of, any unlawful act. Under this provision the mere fact that the insured

face of the policy, yet certain conditions or provisos protected the company against loss, where the death or injury was caused by intentional injuries inflicted by the insured or any other person: American Acc. Co. v. Carson (Ky.), 30 S. W. 879 (1895).

[90] Ripley v. Insurance Co., 16 Wall. (U. S.) 336 (1872).

[91] Lovelace v. Travelers' Prot. Ass'n, 126 Mo. 104, 28 S. W. 877, 30 L. R. A. 209, Woodruff Ins. Cas. 270 (1894).

[92] Brown v. United States, etc., Co., 88 Fed. 38 (1898); Travelers' Prot. Ass'n v. Langholz, 86 Fed. 60, 29 C. C. A. 628 (1898); Butero v. Travelers' Acc. Ins. Co., 96 Wis. 536, 71 N. W. 811 (1897); Johnson v. Travelers' Ins. Co., 15 Tex. Civ. App. 314, 39 S. W. 972 (1897); Railway Officials', etc., Ass'n v. McCabe, 61 Ill. App. 565 (1895); Phelan v. Travelers' Ins. Co., 38 Mo. App. 640 (1890); Travelers' Ins. Co. v. McConkey, 127 U. S. 661 (1888).

[93] Ging v. Travelers' Ins. Co., 74 Minn. 505, 77 N. W. 291 (1898).

[94] American Acc. Co. v. Carson, 99 Ky. 441, 36 S. W. 169, 34 L. R. A. 301 (1895).

is violating some criminal statute does not absolve the company from liability unless it appears that the death was in some manner caused by such violation of law. As said in a case in Indiana,[95] "the known violation of a positive law * * * avoids the policy if the natural and reasonable consequences of the violation are to increase the risk. A violation of law does not avoid the policy if the natural and reasonable consequences of the act do not increase the risk."

The insurance company must, therefore, show that the act was such as tended to produce the injury. Thus, where the insured came to his death while engaged in seining in a river, in violation of a statute, the court, after stating the general principle, said:[96] "If the insured had been accidentally shot or struck by lightning while fishing in violation of law, it could not be successfully maintained that there was a forfeiture." Applying the rule that it must be made to appear that the injury was the natural result of a violation of law, it was held that the fact that the insured was killed by being shot soon after he had left a house of ill fame, while carrying a concealed weapon, did not prevent a recovery on the policy. Chief Justice Kinne said:[97] "It may be conceded that Jones visited a house of prostitution for an unlawful purpose; that he was carrying concealed weapons, in violation of law, but it does not appear that the injuries he received were caused by any of these illegal acts. It is not enough to defeat liability to show that the insured violated the conditions of the policy in these respects, but it must also be shown that such violation had a causative connection with the injury. The shooting was not, in a legal sense, caused by, or the result of, the assured's visit to the bawdyhouse, reprehensible as that act may have been, nor by his carrying concealed weapons in violation of law. In other words, it does not appear that there was any such connection between the unlawful acts and the injury as would justify the contention that the former caused the latter. If the injury was caused or produced by something else than the assured's violation of the law, then the latter can not be said to have such a legal relation to the former as to be a defense to an action upon the policy. If the acts were in themselves unlawful, as they were, and the shooting might reasonably have been expected to have re-

[95] National Ben. Ass'n v. Bowman, 110 Ind. 355, 11 N. E. 316 (1887); Supreme Lodge v. Beck, 181 U. S. 48 (1900). See § 373, *supra*.

[96] Conboy v. Railway, etc., Ass'n (Ind. App.), 43 N. E. 1017 (1896).

[97] Jones v. United States, etc., Ass'n, 92 Iowa 652, 61 N. W. 485 (1874).

sulted from them, then a causative connection between the unlawful acts and the injury may be said to have been established."[98]

Where the insured was shot by an officer who was attempting to arrest him as a deserter, the death did not result from the unlawful act of the insured, as the insured was not acting unlawfully at the time of the killing.[99] So, where the insured was injured while at the house of a friend, a few hours after he had been hunting on Sunday, in violation of law, it was held that he could recover on the policy.[100] But where the accident happened while the insured was returning from a hunting expedition, and a statute made both hunting and traveling on Sunday a crime, the insured was not allowed to recover. The court said:[101] "The effect of a violation of the Sunday law upon a person's right to recover for injuries received in the course of such violation has generally arisen in cases in which the defendant sought to escape responsibility for his own tort to a traveler or laborer. On this question the decisions have not been uniform. Some courts have held that the immediate cause of the injury was the travel or labor on Sunday and that the plaintiff could not recover. Other able courts have held that a Sunday traveler or laborer, injured by the wrongful act or neglect of another, might recover upon the ground that the violation of the Sunday law by the injured party is in the nature of a condition rather than the immediate cause of the injury. * * * The provision quoted from the policy excluded liability from any injury of which a violation of law was the cause or condition producing it. It also expressly provides exemption from liability where the violation of law is either the proximate or remote cause or condition producing the injury. In short, it is so drawn as to exempt from liability under the reasoning and holding of the courts in both classes of cases cited. Plaintiff contends in argument that he was not engaged in hunting at the time he received the injury,

[98] See, also, Bradley v. Mutual, etc., Ins. Co., 45 N. Y. 422 (1871); Murray v. New York, etc., Ins. Co., 96 N. Y. 614 (1884); Griffin v. Western, etc., Ass'n, 20 Neb. 620, 31 N. W. 122 (1887); Accident Ins. Co. v. Bennett, 90 Tenn. 256, 16 S. W. 723 (1891) [where the insured was killed while living with a mistress in violation of law].

[99] Utter v. Travelers' Ins. Co., 65 Mich. 545, 32 N. W. 812, 8 Am. St. 913 (1887). See, also, Griffin v. Western, etc., Ass'n, 20 Neb. 620 (1890); Goetzman v. Connecticut, etc., Ins. Co., 3 Hun (N. Y.) 515 (1875).

[100] Prader v. National, etc., Ass'n, 95 Iowa 149, 63 N. W. 601 (1895).

[101] Duran v. Standard, etc., Ins. Co., 63 Vt. 437, 22 Atl. 530, 25 Am. St. 773, 13 L. R. A. 637 (1891).

but was walking home after he had been visiting. Were his claim conceded, we do not see how it gives the plaintiff any better ground for recovery. * * * The plaintiff was clearly violating the provisions of the statute prohibiting traveling on Sunday. Every step he took in making that trip was in and of itself a violation of law. In taking one of those steps he slipped and was injured. * * * The liability to accident must be greatly increased in the case of a person who, like the plaintiff, engages in hunting or traveling about the country on Sunday in open violation of law, as compared with one who observes the law. The defendant had the right to show that it should not assume such increased risk."

A person who was shot by one upon whom he had made a violent assault died in consequence of a violation of law.[102] So, a woman who voluntarily submits to an operation for abortion is engaged in a violation of law, and there can be no recovery upon a policy for death resulting therefrom.[103]

There is some difference of opinion as to whether the law which is being violated must be a criminal statute. It was held in Massachusetts that to invalidate the policy there must be a violation of some criminal statute.[104] A contrary view was expressed in New York;[105] and in Indiana the court said:[106] "In our opinion, the law is this: A known violation of a positive law, whether the law is a civil or a criminal one, avoids the policy if the natural and reasonable consequences of the violation are to increase the risk; a violation of law, whether the law is a civil or a criminal one, does not avoid the policy if the natural and reasonable consequences of the act do not increase the risk."

§ 402. **Injuries received while intoxicated.**—Where the contract provides that there shall be no recovery for injuries which are received while the insured is intoxicated, the insurance company is not liable, although the intoxication did not contribute to the injury.[107]

[102] Murray v. New York L. Ins. Co., 96 N. Y. 614, Woodruff Ins. Cas. 301 (1884); Bloom v. Franklin L. Ins. Co., 97 Ind. 478 (1884).

[103] Hatch v. Mutual L. Ins. Co., 120 Mass. 550, 21 Am. R. 541 (1876). As to suicide being a violation of this provision, see § 373, *supra*.

[104] Cluff v. Mutual, etc., Ins. Co., 13 Allen (Mass.) 308 (1866). See, also, Harper v. Phœnix Ins. Co., 19 Mo. 506 (1854).

[105] Bradley v. Mutual, etc., Ins. Co., 3 Lans. (N. Y.) 341, 45 N. Y. 422 (1870).

[106] Bloom v. Franklin L. Ins. Co., 97 Ind. 478 (1884).

[107] Standard, etc., Ins. Co. v. Jones,

III. *General Provisions.*

§ 403. Amount of recovery—Disability.—The contract is commonly for the payment of a specified sum for certain injuries, such as the loss of a hand,[108] foot,[109] or eye,[110] and the payment of a certain sum in case of total disability. As said by Mr. Justice Mitchell:[111] "The principal contest is as to the construction of that part of the policy, and particularly the term, 'wholly disabled.' Accident insurance being of comparatively recent origin, the policies do not seem to have acquired any settled form; and the decisions construing them are comparatively few, and do not seem to have agreed on any very definite meaning to be given to the term 'total disability.'[112] The cases which have placed a construction on the term 'total disability' might seem to be divided into two classes; viz., those which construe it liberally in favor of the insured,[113] and those which construe it strictly against him.[114] Any apparent conflict in the decisions may, however, be mostly reconciled in view of the differences in the language of the policies, and of the different occupations under which the parties were insured. As is well said in *Wolcott* v. *United Life, etc., Assn.*,[115] 'total disability must, from the necessity of the case, be a relative matter, and must depend largely upon the occupation and employment in which the party insured is engaged.' One who labors with his hands might be so disabled by a severe injury to one hand as not to be able to labor at all at his usual occupation; whereas a merchant or professional man might, by the same injury, be only dis-

94 Ala. 434, 10 So. 530 (1892); Shader v. Railway, etc., Assur. Co., 66 N. Y. 441, 23 Am. Rep. 65, Woodruff Ins. Cas. 297 (1876). See Jones v. United States, etc., Ass'n, 92 Iowa 652, 61 N. W. 485 (1894).

[108] See Lord v. American, etc., Ass'n, 89 Wis. 19, 26 L. R. A. 741 (1894); Hutchinson v. Supreme Tent Co., 68 Hun (N. Y.) 355 (1893).

[109] Sheanon v. Pacific, etc., Ins. Co., 83 Wis. 507, 9 L. R. A. 685 (1892); Stevers v. People's, etc., Ins. Ass'n, 150 Pa. St. 132, 16 L. R. A. 446 (1892).

[110] Mogé v. Société, etc., 167 Mass. 298, 39 L. R. A. 736 (1896); Humphreys v. National Ben. Ass'n, 139 Pa. St. 214, 11 L. R. A. 564 (1891).

[111] Lobdill v. Laboring Men's, etc., Ass'n, 69 Minn. 14, 38 L. R. A. 537 (1897).

[112] See cases cited in Bacon Ben. Soc., § 501; Niblack Vol. Soc., § 401. See 4 Harvard Law Review 180 (1890).

[113] Hooper v. Accidental, etc., Ins. Co., 5 Hurl. & N. 545 (1860); Young v. Travelers' Ins. Co., 80 Me. 244 (1888).

[114] Lyon v. Railway, etc., Assur. Co., 46 Iowa 631 (1877); Saveland v. Fidelity & Cas. Co., 67 Wis. 174, 58 Am. Rep. 863 (1886).

[115] 55 Hun (N. Y.) 98 (1889).

abled from transacting some kinds of business pertaining to his occupation. In policies of this character the aim of the insurer is usually to get as large premiums as possible by incurring the least possible liability; and, on the other hand, after the accident occurs the usual aim of the insured is to recover the greatest amount of indemnity for the least possible injury. All the courts can do is to construe the contract the parties have made for themselves; but in doing so they should give it a reasonable construction, so as, if possible, to give effect to the purpose for which it is made. There are a few propositions applicable to the construction of the policy under consideration which, under the evidence, are decisive of this case. The first is that total disability does not mean absolute physical inability on the part of the insured to transact any kind of business pertaining to his occupation. It is sufficient if his injuries were of such a character that common care and prudence required him to desist from the transaction of any such business so long as it was reasonably necessary to effectuate a cure. This was a duty which he owed to the insurer as well as to himself.[116] The second is that, under the particular terms of this policy, to wit, 'from the transaction of any and every kind of business pertaining to the occupation above stated (merchant),' inability to perform some kinds of business pertaining to the occupation would not constitute total disability within the meaning of the policy. * * * But the mere fact that he might be able, with due regard to his health, to occasionally perform some single and trivial act connected with some kind of business pertaining to his occupation as a merchant would not render his disability partial instead of total, provided he was unable substantially or to some material extent to transact any kind of business pertaining to such occupation. To illustrate this proposition by reference to the evidence in this case, it appears, as we shall assume, that on one or two occasions where the plaintiff went into his store, when down town for other purposes, he handed out some small article to a customer, and took the change for it. This would not necessarily prove that he was able to attend to the business of waiting on customers, and that he was not 'wholly disabled' within the meaning of the policy. He might be able on temporary visits to the store to occasionally perform a trifling act of this nature and yet be substantially and essentially unable to transact any kind of business pertaining to his occupa-

[116] Young v. Travelers' Ins. Co., 80 Me. 244 (1888).

tion of merchant. The frequency and nature of these acts would be for the consideration of the jury in determining whether he was totally disabled, but would ordinarily be by no means conclusive on that question."

The fact that a man whose business was that of making loans on personal security goes to his office for a short time every day, without doing any work or business there, does not show that he was not totally disabled from prosecuting any and every kind of business pertaining to his occupation.[117]

§ 404. **Construction—Effect of existing judicial decisions.**—In an action on a policy containing a provision which had, prior to its issuance, been given a uniform judicial construction by the courts of last resort of several states, it will be presumed that such construction was adopted by the parties and the policy issued with that understanding. A policy contained a provision that the insurance should cover "injuries, fatal or otherwise, resulting from poison or anything accidentally or otherwise taken, administered, absorbed or inhaled." Prior to its issuance another policy issued by the same company had been construed so as not to exempt the company from liability for the death or injury of the insured resulting from the unconscious and involuntary inhaling of illuminating gas while asleep. It was held by the circuit court of appeals that the same construction would be adopted in an action on the latter policy. The court said:[118] "The defendant company issued the policy in suit, and doubtless many others of like character, after it was advised by the decisions to which reference has been made, one of which was a construction of its own contract, that, as interpreted by the courts of last resort in several states, the policy as drawn would not exempt it from liability if poisonous gas was unconsciously, involuntarily and accidentally inhaled by the insured, which occasioned his death or injury. It had knowledge, therefore, that by reason of such adjudication its policies, if it continued to issue them in the old form, would in all probability be accepted by some, and possibly many persons, upon the understanding that the company intended, and in fact assumed, the species of risk last described. If such was not its intention, its plain duty

[117] Turner v. Fidelity & Cas. Co., 112 Mich. 425, 38 L. R. A. 529 (1897), annotated. See also, Hoffman v. Michigan, etc., Ass'n (Mich.), 54 L. R. A. 746 (1901).

[118] Fidelity, etc., Co. v. Lowenstein, 97 Fed. 17, 38 C. C. A. 29 (1899), and cases there cited.

was to so modify the language of its policy as to make its purpose clear, inasmuch as a slight change in the phraseology originally employed would leave no room for doubt or speculation as to its meaning. We are unwilling to concede that the insurance company may continue to issue policies, with no modification of their terms, after certain provisions thereof have been construed by several courts of the highest character and ability, and be heard to insist in controversies between itself and the insured with respect to such subsequently issued policies, that they do not in fact cover risks which they had been judicially adjudged to cover before they had been issued. While it may not be accurate to say that under such circumstances a technical estoppel arises in favor of the insured, yet courts in such cases should rigidly enforce the rule requiring policies of insurance to be construed most strongly against the insurer, and they should not hesitate to hold that decisions construing a policy adversely to the contention of the insurer thereafter create a doubt as to the proper interpretation of sufficient gravity to be resolved in favor of the insured."

CHAPTER XVI.

EMPLOYERS' LIABILITY, GUARANTY AND TITLE INSURANCE.

I. Employers' Liability Insurance.

§ **410. In general.**—The constant risk from damage suits to which employers of men engaged in manufacturing, transportation and other business are exposed has led to the adoption of a form of insurance which is commonly known as employers' liability insurance. The insurance company, for an adequate premium, agrees, subject to specific exceptions, restrictions and conditions, to protect the employer against liability or loss resulting from actions brought against him by his employes to recover damages for personal injuries caused by the negligence of the employer or his representatives. The business has reached considerable magnitude, and in some states there are statutes which authorize the incorporation of companies for the express purpose of writing such insurance.

As between master and servant, a contract exempting the master from liability for the results of his negligence is void as against public policy; but by the great weight of authority, a contract with a third person by which such third person agrees to indemnify the master is valid.[1]

[1] Trenton Pass. R. Co. v. Guarantors', etc., Indem. Co., 60 N. J. L. 246, 44 L. R. A. 213 (1897); American Cas. Ins. Co.'s Case, 82 Md. 535

§ 411. **Injuries while engaged in designated business.**—The employer is insured against loss resulting from his liability for injuries received by his employes while engaged in a designated business. The provision with reference to the business is liberally construed for the purpose of securing to the insured the protection for which he has paid. Where a policy insured an ice company against claims for damages on the part of its employes "in all operations connected with the business of ice dealers," it was held that, taking into consideration the statements contained in the application, this language covered only employes in the operating department, and that a person injured while engaged in constructing an ice house was not one of such employes.[2]

A policy was issued under which the liability was restricted to injuries to employes while engaged in occupations connected with the business of iron and steel works; that is, in the operating department as distinguished from a business like that of constructing necessary buildings. An employe was injured while at work in the operating department by the fall of a girder which was being raised to its position by an independent crew engaged in this work. The court said:[3] "The general language of the contract, 'all operations

(Boston, etc., R. Co. v. Mercantile Trust, etc., Co., 38 L. R. A. 97, 34 Atl. 778) (1896); Kansas City, etc., R. Co. v. Southern Ry. News Co., 151 Mo. 373, 52 S. W. 205, 45 L. R. A. 380, 74 Am. St. 545 (1899). As to the right of the injured employe to maintain an action upon the policy of insurance, see Embler v. Hartford, etc., Ins. Co., 158 N. Y. 431, 53 N. E. 212, 44 L. R. A. 512 (1899). That such policies sometimes provide for the apportionment of the loss between the insured and the insurer,—see Rumford Falls Paper Co. v. Fidelity, etc., Co., 92 Me. 574, 43 Atl. 503 (1899). That this is also true of credit insurance contracts,—see Jaeckel v. American, etc., Indem. Co., 34 App. Div. (N. Y.) 565 (1898).

[2] People's Ice Co. v. Employers', etc., Assur. Corp., 161 Mass. 122, 36 N. E. 754 (1894).

[3] Hoven v. Employers', etc., Assur. Corp., 93 Wis. 201, 67 N. W. 46, 32 L. R. A. 388 (1896). In reference to People's Ice Co. v. Employers', etc., Assur. Corp., 161 Mass. 122, 36 N. E. 754 (1894), the court said: "We are not prepared to say but that there was reasonable ground to hold that the policy, taken in connection with the application, and the language of the schedule, 'all operations connected with the business of ice dealers,' covered only persons engaged in the actual operations of cutting, handling, storing and delivering ice, and not those engaged in the construction of storehouses; nevertheless, we should hesitate to adopt such construction if the precise question were before us."

connected with the business of iron and steel works,' is not restricted by anything in the conditions indorsed on the policy or any paper referred to or made a part of it. If the intention was to restrict such language to operations in any particular department, or to any particular branch of the business, or to any particular instrumentalities used in such business, it was easy to have said so in unmistakable language. The court should give the general language the assurer saw fit to use, under the circumstances, a broad and liberal construction in favor of the objects for which the policy was taken out; and by so doing the conclusion is easily reached that it covers the operation of constructing a building for the use of the assured in its business as one of the operations connected with such business."

But a policy indemnifying for damages on account of injuries to persons not employes, resulting from "accident to or caused by horses, cars, plant, ways, works, machinery or appliances used in the business of the insured and described in the application," does not cover injuries caused by the use of omnibus sleighs, as the risk would be different. "The defendants would not have been liable under the terms of the policy if the motive power had been changed by the use of steam or electricity instead of horses; and we are not able to see that the result is different when one kind of a vehicle is substituted for another. * * * Whether the risk would be increased or diminished would depend upon the circumstances of the particular case, but it is evident that the risk in the use of sleighs differs from that in the use of cars."[4]

A policy was issued upon an application which stated: "It is understood that in the conduct and operation of their business, the insured employ a railroad owned by themselves and used only for their own lumbering purposes." The insurance was against liability to persons who should "sustain bodily injuries under circumstances which would impose on the insured a common-law or statutory liability therefor." The company's lumbering operations were carried on upon lands owned by it, and it had mills and dwellings for its workmen in a region not otherwise inhabited. It also had, in connection with the mills and dwellings for the workmen mentioned, a store, in which it kept for sale to its agents and other workmen such materials and goods as they required. These buildings and mills were remote from any other settlement and could not be reached by any public

[4] Phillipsburg Horse Car Co. v. Fidelity, etc., Co., 160 Pa. St. 350, 28 Atl. 823 (1894).

road or highway. The company constructed and operated on its own land, and primarily for use in its business, a railway by which logs were transported to the mills and manufactured into lumber, and from the mills to an ordinary road some miles distant. Necessary supplies for the store were transported over the railroad as occasion required, and the company's agents and workmen, and persons having business at the mill or at the shop, such as commercial travelers, were carried from time to time over the railway. From some of such persons the company demanded and collected pay for transportation. Two commercial travelers, who had been to the store to take orders, were, by special arrangement and for compensation, being carried over the road on a locomotive, which was overturned, and the passengers received injuries for which they recovered damages from the railroad company. It was held that under all the circumstances the injuries occurred within the scope of the company's lumbering operations, and that the insurance company was therefore liable.[5]

§ **412. Violation of statute by insured.**—It is sometimes provided that there shall be no liability for injuries to employes caused by the neglect of the insured to obey statutes and ordinances designed for the protection of such employes. Where the policy insured against liability for injuries accidentally sustained by employes, except a child illegally employed, it was held that the company was not liable for damages which were recovered from the insured for injuries sustained through its negligence by a child under twelve years of age, employed in violation of law. The insured claimed that under this contract the insurance company was exempted from liability only where the injuries were proximately caused by the illegality of the employment, but the court said:[6] "We can entertain no doubt but that the meaning of the clause in question which was intended by the parties, and which should be given it by the courts, is the popular meaning as distinguished from the purely technical, legal meaning. So construed, all difficulties disappear, and the clause becomes a substantial limitation, as undoubtedly intended by the parties, and it encourages no violation of law, but rather discourages it."

In a recent New York case, the application upon which the policy was issued contained an agreement on the part of the insured, a ce-

[5] Travelers' Ins. Co. v. Wild River Lumber Co., 83 Fed. 977, 28 C. C. A. 127 (1897).

[6] Goodwillie v. London Guarantee, etc., Co., 108 Wis. 207, 84 N. W. 164 (1900).

ment company, to "conduct all business and maintain all premises to which such proposed insurance may apply in strict compliance with all statutes and ordinances provided for the safety of persons." One of the employes of the insured was injured while attempting to oil a shafting in certain machinery, and subsequently brought an action against the cement company and secured judgment, which the cement company paid and demanded from the insurance company. The insurance company claimed that the insured had forfeited its right to indemnity because it had failed to maintain its premises in compliance with the factory act, which required such machinery to be properly guarded. "There are but few cases," said Mr. Justice Haight,[7] "to be found in our courts in which the provisions of the factory act have been construed, and these offer but little aid in construing the provisions here involved. The manifest purpose of the enactment was doubtless to give more force to the existing rule that masters should afford a reasonably safe place in which their servants are called upon to work. We think, however, that the legislature could not have intended that every piece of machinery in a large building should be covered or guarded. This would be impracticable. What evidently was intended was that those parts of the machinery which were dangerous to servants whose duty required them to work in its immediate vicinity should be properly guarded so as to minimize, as far as practicable, the dangers attending their labors. Human foresight is limited, and masters are not called upon to guard against every possible danger. They are required only to guard against such dangers as would occur to a reasonably prudent man as liable to happen." It appearing that this had been done, the company was allowed to recover upon the policy of insurance.

§ 413. **When liability accrues.**—Whether the insured can maintain an action against the insurer without having paid the claim of an employe depends, of course, upon the language of the policy. If the insurance is against damages actually suffered, it is necessary for the insured to pay the judgment or claim against it before proceeding against the insurance company. But where the policy by its terms protects the insured against liability for damages for injuries suffered by his employes, it is not necessary that the liability be discharged before bringing an action.[8] "According to the terms of the

[7] Glens Falls, etc., Co. v. Travelers' Ins. Co., 162 N. Y. 399, 56 N. E. 897 (1900).

[8] Hoven v. Employers', etc., Assur. Corp., 93 Wis. 201, 67 N. W. 46, 32 L. R. A. 388 (1896).

policy," said Mr. Justice Martin,[9] "the insurance company undertook to pay all such sums as the railway company should become liable for in damages in consequence of bodily injuries caused by the operation of its street railway. Upon the occurrence of an accident in respect to which a claim for damages may have arisen, notice was required to be immediately given by the railway company to the insurance company. * * * The insurance company assumed the liability for such claim and had authority to settle it without litigation. If any legal proceedings were instituted against the railroad company to enforce it, the insurance company bound itself to take absolute control of the same in the name and in behalf of the assured. In only one way could it have absolved itself from this obligation, and that was by paying or offering to pay the insured the full amount for which it was liable in such cases by its policy. According to these terms, the ascertainment and adjustment of the liability of the insured for claims for damages depended upon the insurance company, provided it acted in good faith. The assured surrendered the entire control and management thereof to the insurer. So long as the latter resisted in the courts the enforcement of such claims, no right of action accrued upon the policy; for, until the termination of the litigation, both parties denied the liability of the assured, and the existence and extent thereof remained undetermined, according to the methods by which the parties, in effect, agreed it should be ascertained and fixed. Any other interpretation of the policy would take from the insurer the protection for which it contracted." But the liability of the insured is not determined so as to render it liable to pay such damages so long as an action is pending in court against the insured, or an appeal from a judgment therefor is pending in the supreme court.

An employers' liability policy provided (1) that it insured against all liability on account of fatal or non-fatal injuries suffered by an employe; (2) that the company, at its own expense, would take upon it the settlement of any loss, and the control of any legal proceedings taken against the insured to enforce a claim for injuries to an insured employe; (3) that the insured should not settle for any injury without the consent of the insurance company; (4) that no action should lie against the insurance company after the period in which

[9] Fidelity, etc., Co. v. Fordyce, 64 Ark. 174, 41 S. W. 420 (1897). See also, American, etc., Ins. Co. v. Fordyce, 62 Ark. 562, 54 Am. St. 305 (1896).

action might be brought by the employe against the insured, unless at such period there was a suit pending for such purpose, in which case the action might be brought in respect to a claim involved in such suit against the company within thirty days after a judgment was rendered in such suit, and not later. It was held that this policy was not one merely of indemnity against any act of an employe, but that in case of accident to him whereby he had a cause of action against the insured, the insurance company would assume and pay the liability. Also, that an employe having, while so employed, sustained injury and recovered a judgment therefor against the insured, the insurance company was liable therefor in an action against it without the employer having first paid the judgment.[10]

§ **414. Effect of judgment against insured.**—Ordinarily, questions determined in a suit brought by the employe against the employer to recover damages for personal injuries are *res adjudicata,* in a proceeding by the employer against the insurance company to recover upon a policy covering the particular risk in question.

In a New York case, an action was brought by an employe against his employer to recover damages for personal injuries alleged to have been caused by the negligence of the employer. The defense was undertaken by the insurance company, but a short time before the time set for trial it withdrew from the defense and permitted judgment to go by default on the theory that the evidence showed that the employer had neglected to comply with the provisions of the statute for the protection of his employes, and therefore the insurance company was not, under the terms of its policy, liable for the loss. In an action subsequently brought against the insurance company by the employer, it was claimed that the question of negligence of the employer in failing to comply with the statutory provisions was *res adjudicata,* but the court said:[11] "We do not think that the adjudication in that action is binding upon the plaintiff in this action, for the reason that, under the contract of insurance, the insurance company had agreed to defend the action, and had conducted such defense down to the eve of the trial, and then withdrew, leaving the cement company without reasonable opportunity to prepare its own defense to the action. Had the insurance company continued its defense, it might

[10] Anoka Lumber Co. v. Fidelity, etc., Co., 63 Minn. 286, 65 N. W. 353, 30 L. R. A. 689 (1895).

[11] Glens Falls, etc., Co. v. Travelers' Ins. Co., 162 N. Y. 399, 56 N. E. 897 (1900).

have shown upon the trial that the cement company was free from negligence in the matter, and thus have avoided judgment against the company; but having withdrawn from the defense of that action improperly, and permitted judgment to go against the cement company by default, it is now estopped from claiming that the adjudication thus obtained precludes the plaintiff from the indemnity which the defendants had contracted to render."

§ 415. **Notice of injury or claim.**—A provision in a policy of this character, to the effect that notice shall immediately be given to the company of the occurrence of an accident, is a condition precedent to liability, although the policy contains no forfeiture clause. Where an employe made no claim for damages until nine months after the accident, a notice given at that time was held to be too late. "Certainly we can not hold," said the court, "under the conditions of this policy, that the notice of the claim for damages, made for the first time nine months after the accident, satisfied the requirement that immediate notice should be given of the occurrence of the accident; nor can we hold that such requirement was not a condition precedent; nor can we hold that such notice of an accident given for the first time nine months after the occurrence of the accident was immediate notice within the condition quoted, as those words have been repeatedly construed in this court."[12]

But in Minnesota, under a policy which contained a clause to the effect that "the insured, upon the occurrence of an accident, and upon notice of any claim on account of an accident, shall give immediate notice in writing of such accident, or claim, with the fullest information available, to the company, at its office in New York City, or to an agent, if any, who shall have countersigned this policy," it was held that the insured need not give notice to the insurance company until notice that a claim had been made.[13]

[12] Underwood Veneer Co. v. London Guar., etc., Co., 100 Wis. 378, 75 N. W. 996 (1898); quoting Kentzler v. American, etc., Acc. Ass'n, 88 Wis. 589, 60 N. W. 1002 (1894). See further, as to the construction of the provision requiring notice, Grand Rapids, etc., Co. v. Fidelity, etc., Co., 111 Mich. 148, 69 N. W. 249 (1896).

[13] Anoka Lumber Co. v. Fidelity, etc., Co., 63 Minn. 286, 65 N. W. 353, 30 L. R. A. 689 (1895).

II. *Fidelity Insurance.*

§ **416. In general.**—Contracts by which a party is insured against loss[14] by the fraud or dishonesty of his employes are contracts of insurance and not of suretyship.[15] "Guaranty insurance," said Mr. Justice Wilkin,[16] "is, in its practical sense, a guaranty or insurance against losses in case the person so guaranteed makes a designated default or be guilty of specified conduct. It is usually against misconduct or dishonesty of an employe or officer, though sometimes against a breach of contract. This branch of insurance is so much more modern in origin and development than fire, marine, life and accident insurance that there are few decisions upon the subject; but the business is gradually increasing and is doubtless destined to take an important place in the commercial world. It may be confidently stated that, notwithstanding the comparative absence of specific decisions, the general principles applicable to other classes of insurance are applicable here as well. Thus, the general doctrine of warranty, representation and concealment, as applied to fire, life and marine insurance, is applicable also to the subject of guaranty insurance."

Fidelity policies usually provide that the insured shall promptly notify the company of any fraud or dishonesty on the part of the employe.[17] A condition in the bond of fidelity insurance, which requires

[14] As to what are "losses," see Rice v. National, etc., Ins. Co., 164 Mass. 285, 41 N. E. 276 (1895).

[15] Supreme Council v. Fidelity, etc., Co., 63 Fed. 48, 11 C. C. A. 96 (1894); Mechanics' Sav. Bank & Trust Co. v. Guarantee Co., 68 Fed. 459 (1895). The principal questions which have arisen out of credit insurance have been those of construction. As an illustration, see the cases of Smith v. National, etc., Ins. Co., 65 Minn. 283, 68 N. W. 28, 33 L. R. A. 511 (1896), and Shakman v. United States, etc., Co., 92 Wis. 366, 66 N. W. 528, 53 Am. St. 920 (1896).

[16] People v. Rose, 174 Ill. 310, Woodruff Ins. Cas. 16 (1898); quoting 9 Am. & Eng. Enc. Law 65. See, also, People v. Fidelity, etc., Co., 153 Ill. 25 (1894); Claflin v. United States, etc., Co., 165 Mass. 501, 52 Am. St. 528 (1896). For the general principles of insurance governing contracts of this character, see Mechanics' Sav. Bank & T. Co. v. Guarantee Co., 68 Fed. 459 (1895); Supreme Council v. Fidelity & Cas. Co., 63 Fed. 48, 11 C. C. A. 96 (1894). In the Mechanics' Sav. Bank case the court said: "The business is therefore becoming one of vast public as well as private importance, and it can not be objected if rules of reasonable stringent liability are applied to these contracts as in other forms of insurance."

[17] Where the relation of principal and surety exists, the surety is en-

that a claim thereunder shall be made as soon as practicable after the discovery of the loss, and within six months after the expiration of the bond, must be complied with or there can be no recovery; and the fact that the insurance company has actual knowledge of the loss does not excuse compliance with such a condition.[18] Where the contract requires that written notice of any act of the employe involving loss to the employer shall be given as soon as practicable after knowledge of such act, it is not necessary to give notice of a mere suspicion. Thus, where a bond was given to protect a bank from the dishonesty of its cashier, it was held that notice need be given only after the bank had knowledge of such facts as would justify a charge of fraud or dishonesty against the cashier.[19]

The notice must be given within a reasonable time. A bond provided that notice should be given the company of any act of the cashier of a bank which might involve loss for which the insurance company might be responsible, "as soon as practicable after the occurrence of such acts shall have come to the knowledge of the bank." The bank suspended payment and passed into the hands of a receiver, and afterwards notified the surety company of the discovery of dishonest acts of the cashier, and made proofs of loss as required. It was held to be

titled to notice, although it is not expressly provided for in the bond. In Phillips v. Foxall, L. R. 7 Q. B. 666 (1872), it was said: "We think that in the case of a continuing guaranty for the honesty of a servant, if the master discovers that the servant has been guilty of acts of dishonesty in the course of the service to which the guaranty relates, and if, instead of dismissing the servant, as he may do at once, and without notice, he chooses to continue in his employ a dishonest servant, without the knowledge and consent of the surety, express or implied, he can not afterwards have recourse to the surety to make good any loss which may arise from the dishonesty of the servant during the subsequent service." To the same effect, see Lancashire Ins. Co. v. Callahan, 68 Minn. 277 (1897). *Contra*, see Phenix Ins. Co. v. Findley, 59 Iowa 591, 13 N. W. 738 (1882).

[18] California Sav. Bank v. American Surety Co., 87 Fed. 118 (1898); Michigan Sav., etc., Ass'n v. Missouri, etc., Trust Co., 73 Mo. App. 161 (1898); Missouri, etc., Trust Co. v. German Nat'l Bank, 77 Fed. 117, 23 C. C. A. 65 (1896) [where a guarantee company, after it knew of the fact that an employe was a defaulter, took security from him without notifying the insured that it disclaimed liability, it was held proper to submit to the jury the question as to whether the guarantee company waived the defense that the employe in his application for the bond had understated his indebtedness to the bank].

[19] American Surety Co. v. Pauly, 170 U. S. 133 (1898).

a question for the jury as to whether notice had been given with reasonable promptness.[20]

Such contracts are strictly limited with reference to the time and manner of employment, and therefore cease to be effective where there is a change of employment. The cashier of a national bank remains in the "service of the bank" after the bank is in the hands of a bank examiner who is investigating its affairs, and until the appointment and qualification of a receiver.[21] In the same case in the lower court it was held that the cashier was "in the service of the bank" while he was in the employ of the receiver, who was winding up the affairs of the bank.[22] So, where a bank was insured against loss through the fraud or dishonesty of an employe in connection with his duties as teller, "or the duties to which, in the employer's service, he may be subsequently appointed or assigned by the employer," the contract was held to cover his misconduct while acting as assistant cashier.[23]

Where a bond, given to secure a bank against loss by reason of fraud or dishonesty of an employe, provided that a claim thereunder should embrace only acts and defaults committed during its currency, and within twelve months next before the discovery of the act or default, it was held that it did not cover a default committed more than twelve months prior to the discovery, which would have been discovered within the year had not such discovery been prevented by the act of the employe in falsifying the books during the year preceding the discovery. The court said:[24] "The bank's position rests upon the assumption that it would have recovered its earlier losses by action upon this bond, but for the fraudulent postponement of their discovery. Let this be conceded, still it is obvious that seasonable discovery of the preceding dishonest acts would have rendered the perpetration of the succeeding ones impossible, and hence that the entire liability [of the surety] is one which could not possibly have accrued if discovery of the earlier embezzlements had been made within the prescribed time; and it is not possible to hold, in the face of a

[20] American Surety Co. v. Pauly, 72 Fed. 470, 18 C. C. A. 644 (1896).

[21] American Surety Co. v. Pauly, 170 U. S. 133 (1898).

[22] American Surety Co. v. Pauly, 72 Fed. 470, 18 C. C. A. 644 (1896).

[23] Fidelity, etc., Co. v. Gate City Nat'l Bank, 97 Ga. 634, 54 Am. St. 440 (1895).

[24] Fidelity, etc., Co. v. Consolidated Nat'l Bank, 71 Fed. 116, 17 C. C. A. 641 (1895); reversing 67 Fed. 874 (1895).

condition limiting liability by the requirement of discovery, that, by reason of non-discovery, the liability so limited was extended or enlarged."

§ **417. Manner of proof.**—The contract often provides that certain facts and statements shall be taken as proof of a default by the employe, and the amount of such default. Where this is done the production of such evidence makes a *prima facie* case against the insurer.[25]

Where a policy insuring against actual loss by theft or dishonesty of an employe provided the means of determining the extent and amount of the shortage, and that, when thus ascertained, it should be accepted as evidence that it was caused by fraud or dishonesty, and not by any of the various other causes enumerated as exceptions, it was held that a shortage so ascertained was *prima facie* evidence of its existence, and that it was caused by the employe's fraud or dishonesty, thus casting the burden upon the insured to rebut the *prima facie* case by sufficient evidence. It was held, however, that it was not bound to do this by affirmative evidence showing a particular one of the causes enumerated as exceptions, but might do it by negative evidence showing that it was not caused by fraud or dishonesty of the employe, and hence must have been produced by one or more of the excepted causes. It was also held, in an action brought by the insurance company against the employe to recover money alleged to have been paid to his employer on the bond, that, the contract of guaranty having been executed at defendant's request, the obligation to indemnify plaintiff was co-extensive with the obligation of the latter to indemnify the employer, and any provisions in the contract between the insurer and the employer as to the proofs of liability were equally binding on the defendant in favor of the plaintiff.[26]

Under a bond to "make good such pecuniary loss, if any, as may be sustained by an employer by reason of fraud or dishonesty of an employe in connection with the duties referred to, amounting to embezzlement or larceny, which was committed or discovered during the continuance of said term or any renewal thereof,"—entries, receipts and reports made by an employe, the treasurer of a benevolent association, during the life of the bond in the ordinary course of his duty,

[25] American Surety Co. v. Pauly, 72 Fed. 484, 18 C. C. A. 657 (1896).

[26] Fidelity, etc., Co. v. Eickhoff, 63 Minn. 170, 30 L. R. A. 586, 56 Am. St. 464 (1895).

charging himself with certain items, are not conclusive against the insurance company as to the time such items were received.[27]

§ 418. Constructive notice.—A bank is not bound by constructive notice of matters brought to the attention of its president and cashier while they were engaged in a fraudulent design to rob the bank. "The presumption that an agent informed his principal of that which his duty and the interests of the principal required him to communicate does not arise where the agent acts or makes declarations not in execution of any duty that he owes to the principal, or within any authority possessed by him, but to subserve simply his own personal ends to commit some fraud against the principal. In such cases the principal is not bound by the acts or declarations of the agent unless it is proved that he had at the time actual notice of them, or, having received notice of them, failed to disavow what was assumed to be said or done in his behalf."[28]

§ 419. Supervision of employe.—The character and extent of the supervision which will be exercised over employes by the insured is a very important factor in the risk assumed by a fidelity insurance company. But an insured owes no duty of supervision to the insurer, unless it is imposed by the contract of insurance.[29]

There is some controversy as to whether a statement made by an applicant for insurance, as to the kind of supervision exercised and the method of checking accounts, is in the nature of a promissory representation and its future observance vital to the contract. In an English case a guaranty company issued a policy upon statements that the accounts were checked weekly. It appeared that this had

[27] Supreme Council v. Fidelity, etc., Co., 63 Fed. 48, 11 C. C. A. 96 (1894). In this decision the various authorities on both sides of the question are collected and reviewed.

[28] American Surety Co. v. Pauly, 170 U. S. 133 (1898); citing Henry v. Allen, 151 N. Y. 1, 36 L. R. A. 658 (1896). See 2 Pomeroy Equity Juris., § 675. In Fidelity, etc., Co. v. Gate City Nat'l Bank, 97 Ga. 634, 54 Am. St. 440 (1895), it was held that where there is nothing in the contract requiring the insured to notify the insurance company that it has learned that the employe is untrustworthy, the knowledge of the cashier is not imputable to the bank. The doctrine of constructive notice is held to have no application to such a contract.

[29] Fidelity, etc., Co. v. Gate City Nat'l Bank, 97 Ga. 634, 54 Am. St. 440 (1895).

been the practice, and that it was discontinued after the policy was issued. It was held that there could be no recovery on the policy.[30]

In a Canadian case it appeared that the policy was issued upon the express condition that the answers contained in the application embraced a true statement of the manner in which the business was conducted, and accounts kept, and that they would be so kept. As there had been no proper supervision exercised over the books, the insured was not permitted to recover for a loss caused by the dishonesty of an employe.[31] A good-faith, customary examination of the books of a bank, such as a committee deemed sufficient for the protection of the bank, is a compliance with a requirement in the bond of a bank teller that the bank shall "observe all due and customary supervision over such employe for the prevention of default."[32]

Where a policy stipulates that a bank "shall observe all due and customary diligence" in the supervision of its employes, it is not obliged to comply with the general bank custom as to the taking of a trial balance from the individual ledgers.[33]

In answer to an inquiry, the employer stated that the employe would be authorized to draw checks to which the countersignature of the bookkeeper would invariably be required. It was held that there could be no recovery for losses caused by the drawing of checks to which the signature of the bookkeeper was not required. The court said:[34] "A written statement made by the employers to the obligee

[30] Towle v. National Guardian Ins. Soc., 7 Jur. (N. S.) 1109 (1861), reversing same case, 30 Law J. Ch. 900 (1860). But in Benham v. United Guarantee, etc., Co., 7 Exch. 742 (1852), the applicant stated in answer to a question as to what checks would be used to secure accuracy in the accounts of the treasurer, that they were "examined by finance committee every fortnight." It was held that this was a mere representation of intention and that there could be a recovery, although the loss was caused by the failure to make such examination.

[31] Harbour Commissioners v. Guarantee Co., 22 Can. Sup. Ct. 542 (1894). So, where the contract provided that the books should be balanced and closed at the end of each quarter: Board of Education v. Citizens' Ins., etc., Co., 30 U. C. C. P. 132 (1879). See also, Hunt v. Fidelity, etc., Co., 99 Fed. 242, 30 C. C. A. 496 (1900), quoted at § 103, *supra*.

[32] Mechanics' Sav. Bank & T. Co. v. Guarantee Co., 68 Fed. 459 (1895).

[33] Guarantee Co. v. Mechanics' Sav. Bank, etc., Co., 80 Fed. 766 (1896).

[34] Rice v. Fidelity & Dep. Co., 103 Fed. 427, 43 C. C. A. 270 (1900) [citing American, etc., Indem. Co. v. Wood, 73 Fed. 81, 19 C. C. A. 264 (1896); American, etc., Indem. Co. v. Carrollton Furn. Mfg. Co., 95 Fed. 111, 36 C. C. A. 671 (1899)].

in a bond of indemnity against the dishonest acts of their employe, to the effect that they will invariably apply certain checks to his action, which the parties expressly agree by the statement itself and the bond, shall be the basis of the latter, and a condition precedent to a recovery upon it, is of the nature of a warranty, and not a representation, and a failure to comply with the promise it contains is fatal to an action upon the bond."

III. Credit Insurance.

§ 420. **In general.**—The practice of insuring merchants and traders against loss through the insolvency or dishonesty of their customers is of very recent origin.[35] Massachusetts seems to be the only state that does not recognize such contracts as insurance, and it is there held that they are invalid whether made by domestic or foreign corporations, because not authorized by the insurance statutes.[36]

It has been contended that the relation between the parties to such a contract is that of principal and surety, but the courts have refused to accept this view. In a recent case it was said:[37] "Insurance against mercantile losses is a new branch of the business of underwriting, and but few cases dealing with policies of that character have as yet found their way into the courts. The necessarily nice adjustments of the respective proportions of loss to be borne by insurer and insured, the somewhat intricate provisions which are required to make such business successful, and the lack of experience in formulating stipulations to be entered into by both parties to such a contract, have naturally tended to make the forms of the policy crude and difficult of interpretation. * * * The cases cited by defendant in error holding that the surety is 'a favorite of the law,' and that a claim against him is *strictissimi juris,* have no application. Corporations entering into contracts like the one at bar may call themselves 'guarantee' or 'surety' companies, but their business is in all essential particulars that of insurers, who, upon careful calculation of the risks of such business, and with such re-

[35] The first case in which such a contract came before the courts was Solvency Mutual Guar. Co. v. York, 3 Hurl. & N. 587 (1858).

[36] Claflin v. United States, etc., Co., 165 Mass. 501, 43 N. E. 293 (1896); Mass. Pub. St. 1887, ch. 214, § 78.

[37] Tebbets v. Mercantile, etc., Guar. Co., 73 Fed. 95, 19 C. C. A. 281 (1896). To the same effect, see Shakman v. United States, etc., Co., 92 Wis. 366, 66 N. W. 528 (1896); United States, etc., Co. v. Robertson (N. J.), 29 Atl. 421 (1894).

strictions of their liability as may seem to them sufficient to make it safe, undertake to insure persons against loss, in return for premiums sufficiently high to make such business commercially profitable. Their contracts are, in fact, policies of insurance, and should be treated as such." Such contracts are therefore to be construed like other contracts of insurance.[38] The general principles governing the making of such contracts apply to contracts of credit insurance.

It was held in England that the rule requiring the utmost good faith on the part of the insured in disclosing facts affecting the risk extends to instruments in the form of a policy guaranteeing the solvency of a person who is a surety for the repayment of borrowed money.[39] But, as in cases of life and fire insurance, the American cases do not apply the rule with reference to concealment so strictly. "We think it is going too far," says Goodrich, P. J.,[40] "to say that the creditor is in all cases, and without being inquired of, bound to communicate everything that it is important for the surety to know that would increase the risk. Under such a rule no one would ever know when he could rely upon a bond, and it would lead to a good deal of litigation. Besides, the duty of the defendants, when applying for a renewal of the bond, stands upon a different basis than their duty when applying for original insurance."

§ 421. **Construction of policy—Amount of recovery.**—A policy which insures against loss on sales, sustained by the insolvency of debtors who have assigned their property for the benefit of creditors, covers an assignment under a state statute, at common law, or for the benefit of a single creditor. "It may be a statutory assignment, a mortgage, a confession of judgment, or some other contrivance, the purpose and effect of which is to dispose of all the debtor's assets and disable him from paying his debts. In such cases the loss is fairly within the scope of the indemnity secured by the insured by this policy. It is the completeness of the transfer and its effect upon the debtor in his business, and not the name or form of the instrument or transaction, that gives it character. Any transfer by a trader or merchant of all his stock in business, when it covers substan-

[38] Mercantile, etc., Guar. Co. v. Wood, 68 Fed. 529, 15 C. C. A. 563 (1895); Mercantile Cred., etc., Co. v. Littleford, 18 Ohio C. C. 889 (1899).

[39] Seaton v. Heath, L. J. 68 Q. B. D. 630 (1899).

[40] American, etc., Indem. Co. v. Wimpfheimer, 14 App. Div. (N. Y.) 498 (1897). See ch. v.

tially all his property, may be an assignment within the meaning of the policy, in spite of its form or the name given to it. * * * A general assignment, within the meaning of the policy, may be made for the benefit of a single creditor or all. It may be in the form prescribed by state statutes, or an assignment at common law. The form of the transaction is not so material as the result, when it operates to divest the debtor of substantially his entire property and closes out his business. Such a transaction means insolvency, within the fair scope of the indemnity."[41]

Within the definition of the term "insolvency," as defined in a policy, was included the return of a writ of execution against the debtor unsatisfied, except where such execution has been issued and returned after the appointment of a receiver. The policy required the insured to give notice within ten days after learning of the insolvency of a debtor, upon blanks furnished by the company and in the manner described therein. The blank contained no reference to insolvency, but required the insured to answer certain questions as to the

[41] People v. Mercantile Credit Guar. Co., 166 N. Y. 416, 60 N. E. 24 (1901). The policy limited liability to cases where "an execution has been returned unsatisfied on a judgment obtained * * * for merchandise sold to said debtor during the period covered by this policy." It was held that a failure to return an execution until three days after the expiration of the policy did not relieve the insurer from liability where the other requirements of the policy had been complied with. "To sustain the decision under review, it is necessary to hold that not only must the goods be sold within the life of the policy, and a judgment rendered and an execution issued, but that it must be returned unsatisfied within that time, which is one year; and that, too, when there is no language in the policy or in the conditions which would warrant such construction. * * * The return of the execution does not constitute the main fact of insolvency, but is simply evidence of that fact; and if the insured, when presenting his proof of loss within the time stipulated, can say that it has then been returned, that is a compliance with the terms of the policy." [Citing Sloman v. Mercantile, etc., Guar. Co., 112 Mich. 258, 70 N. W. 886 (1897).] In the same case the court said: "I can not perceive that the case of Talcott v. National, etc., Ins. Co., 9 App. Div. (N. Y.) 433 (1896), affirmed in this court without opinion, 163 N. Y. 577, 57 N. E. 1125 (1900), has any bearing upon the questions now before us. That action was against another company upon a very different instrument. That case turned upon a condition in the contract to the effect that the insurer should not be liable for any loss of which he did not receive notice during the life of the policy."

failure of the debtor. The word "failure" was held to be used in its commercial sense, and hence a confession of judgment by a debtor who was in business, and the seizure of his stock by the sheriff, causing a suspension of his business, was a failure, and a report thereof within ten days fulfilled the requirement as to notice, and a second notice after the return of an execution unsatisfied was not necessary.[42]

A policy insuring the holder against loss "sustained by reason of the insolvency of debtors owing the insured for merchandise" provided that "in adjusting losses, * * * before determining the percentage of loss to be borne by the company there should first be deducted all sums paid, offered and accepted, settled and secured, and the value of any security and collateral." Under this policy the loss insured against was not the whole amount due from the insolvent debtor at the time of his suspension, but the amount remaining due after deducting any payments made by the debtor. It was also held that the clause, "When only a part of the loss is covered by this policy, a proportionate part of everything released or secured by the insured shall be credited to so much of it as this policy covers," apparently referred to cases where a part of the loss is covered by one policy and part by another. But as it could not be brought into harmony with the rest of the contract, and the instrument considered as a whole

[42] American, etc., Indem. Co. v. Carrollton Fur. Mfg. Co., 95 Fed. 111, 36 C. C. A. 671 (1899); Talcott v. National, etc., Ins. Co., 9 App. Div. (N. Y.) 433 (1896). A bond in this case provided "that in case the second party shall suffer losses in his business during said period of this bond by reason of the insolvency by legal process of any party or parties to whom said second party shall have sold and delivered goods during the period of this bond, * * * or by reason of any judgment or decree of court obtained for goods so delivered within said period of this bond, upon which execution shall have been returned unsatisfied over and above said losses, then the obligor would indemnify the plaintiff as stated in the bond." The insured was required to notify the company within ten days after receiving information of any insolvency or loss, and it was provided that final proof of loss should be made at the home office of the company within thirty days after the expiration of the bond, and that in the event of loss occurring within the life of the bond, of which the obligor had not received notification before the termination of the bond, such loss should not be provable under this policy. Proof could not be made of claims for goods which had been sold during the period covered by the bond but on which no judgment had been obtained or execution returned unsatisfied until after the expiration of the term of the bond.

was ambiguous, that meaning should be given it which is most favorable to the insured.[43]

Where the policy insured against loss by insolvency of debtors owing for merchandise "sold between April 1, 1893, and March 31, 1894," and provided that the policy should "expire on March 31, 1894," and that proofs of loss must be presented within ninety days after the expiration of the policy, and that no loss should be paid until presented in such proofs, except that if the policy should be renewed, losses occurring after such expiration in sales made during its existence were payable, it was held that the company was liable for losses occurring after the expiration of the policy on sales made during its existence, although the policy was not renewed. The court said:[44] "We are of the opinion that the fairer view to take is that the provision in relation to the expiration of the policy refers to the time when sales to be covered thereby shall cease, and that it does not determine the time when losses must occur upon such sales, but that these shall be recoverable, regardless of that date, subject to the limitation as to final proof. This conclusion is justified by the rule that any ambiguity in an instrument is to be resolved against the draftsman."

§ 422. **Identity of the insured.**—In guaranty insurance we find a principle somewhat analogous to that of change in interest or title in fire insurance. Two partners were insured against loss by uncollectible debts, under a policy which provided that "if any member guaranteed with respect to his gross or particular trade debts shall cease to be such trader, his guarantee or contract shall become void on his retiring from such trade," and it was held that the retirement of one partner invalidated the contract.[45] Under such a policy the death of a partner effects such a change in the firm as will release the insurer.[46]

IV. Title Insurance.

§ 423. **Insurance of titles—Construction.**—There are but few cases construing contracts of title insurance. Apparently the gen-

[43] Mercantile Credit, etc., Co. v. Wood, 68 Fed. 529, 15 C. C. A. 563 (1895).

[44] Sloman v. Mercantile, etc., Guar. Co., 112 Mich. 258, 70 N. W. 886 (1897).

[45] Solvency Mut. Guar. Co. v. Freeman, 7 Hurl. & N. 17 (1861).

[46] Cosgrave Brewing, etc., Co. v. Starrs, 5 Ont. 189 (1884); Pemberton v. Oakes, 4 Russ. 154 (1827).

eral principles governing insurance contracts apply to contracts of this nature. Thus, when such a policy contains a condition which renders it void from its inception, and this is known to the insurer when the policy is issued, the condition is waived.[47]

The refusal of an adjoining owner to make compensation for the use of a party wall does not constitute an incumbrance within the meaning of a policy which guarantees the title of real estate against all liens or incumbrances.[48] The words "tenancy and present occupants," used in such a policy as a defect in the title not insured against, do not include a claim of one in actual adverse possession asserting ownership in fee against the title insured. They refer to the tenancy which arises through occupation or temporary possession of the premises by those who are tenants in the popular sense of the word.[49] A condition that "no right of action shall accrue unless the insured has contracted to sell the estate or interest insured, and the title has been declared by a court of last resort and competent jurisdiction defective or incumbered, by reason of a defect or incumbrance for which the company would be liable under this policy," does not apply in an action on the policy where the land was in actual adverse possession of another at the time the policy was issued, and had been actually lost by reason of a defect in the insured's title.[50]

A policy issued to the holder of a mortgage on certain real estate insured him to the amount named against loss through defects in the title to the real estate, or by liens or incumbrances thereon existing at the date of the policy. It provided that no right of action should accrue until the insured had conveyed or agreed to convey to the company his interest in the property at a price, which, in case of title acquired through foreclosure, should be the amount bid at the foreclosure sale, and that payment, discharge or satisfaction of the mortgage indebtedness, except by foreclosure of the mortgage, should annul the policy, and that the insurance company should have an opportunity to defend any suit affecting the title. Suits

[47] Quigley v. St. Paul Title Ins., etc., Co., 60 Minn. 275, 62 N. W. 287 (1895). See this case for the liabilities assumed by the insurance company when it assumes to defend against claims on the mortgaged premises. The same case was again before the court in 64 Minn. 149, 66 N. W. 364.

[48] Thomas v. Tradesmen's Trust, etc., Co., 21 Pa. Co. Ct. 151, 7 Pa. Dist. R. 375 (1898).

[49] Place v. St. Paul Title Ins., etc., Co., 67 Minn. 126, 64 Am. St. 404 (1897).

[50] Place v. St. Paul Title Ins., etc., Co., 67 Minn. 126, 64 Am. St. 404 (1897).

were brought to establish mechanics' liens on the property, which were unsuccessfully defended by the company. The property was then sold to satisfy the liens and the insured foreclosed his mortgage by publication, and at the sale bought it in for the amount due on the mortgage, with interest and costs. The insured having died, his representatives offered to convey to the title insurance company for the amount bid at the foreclosure sale, and demanded, in default of purchase for that amount, that the company redeem the property from the sale under the mechanics' liens. This it declined to do, and the insured's representatives redeemed the property and brought suit against the insurance company for the amount so paid. It was held that the purchase of the property by the insured at the foreclosure sale for the amount due on his mortgage did not cancel his mortgage debt and thus annul the policy, and that the title insurance company was bound either to buy the property for the amount bid at the sale or to redeem it from the sale under the liens, and that the plaintiffs were entitled to recover the amount paid by them for that purpose. "The contract," said the court,[51] "is plain and explicit on this point. In a word, it is a guaranty that the mortgagee shall not suffer any loss or damage by reason of defects in the title to the property, or liens or incumbrances thereon existing at the time of the policy. Under this guarantee, if the mortgage, with a clear title, and free from incumbrances, was worth the amount of the mortgage debt, the mortgagee can confidently rely on the sufficiency of his security. The mechanics' liens upon which the property was sold were liens upon the property at the date of the policy. The defendant company nevertheless refused either to pay this prior lien, or to pay the insured the amount bid for the property at the foreclosure sale, which was the amount of the mortgage debt, thus forcing the insured, in order to protect his security and his title, to redeem the property from the sale under the mechanics' liens. * * * Under the terms of the policy the mortgagee had a right to look to the defendant for the extinguishment of all liens on the property

[51] Minnesota Title Ins., etc., Co. v. Drexel, 70 Fed. 194 (1895). There are many other kinds of risks which are insured against, but the cases construing such contracts are few and not yet of great importance. As to insurance against theft, see George v. Goldsmiths', etc., Ins. Ass'n, 67 L. J. (Q. B. D.) 807, 78 L. T. Rep. 813 (1898). As to insurance against loss of rents, see Heller v. Royal Ins. Co., 133 Pa. St. 152, 19 Atl. 349, 7 L. R. A. 411 (1890). See § 7, *supra*.

which existed at the date of the policy, and to gauge his bid on the assumption that the defendant would discharge his obligation in this regard."

A policy insured against "all loss by reason of defects or unmarketableness of the title to the estate or interest insured, or because of liens or incumbrances, charging the same at the date of this policy, saving the defects, liens or incumbrances excepted in schedule B." This schedule provided that "unmarketableness by reason of the possibility of mechanics' and municipal liens is excepted from this insurance, but actual losses by reason of such liens, or by reason of the non-completion of the building now in process of erection on the premises, unless such building should happen to be destroyed by fire, are hereby insured against." It was held that claims for municipal work done three years after the policy was issued were not within the policy.[52]

[52] Wheeler v. Real Estate Title Ins., etc., Co., 160 Pa. St. 408, 28 Atl. 849 (1894).

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